In the District Court of the United States for the Northern District of California
Northern Division.

Equity No. 2787S

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, EDMUND BURKE, WALTER E. BURKE, as Trustee for VILLA M. BEHAN, VILLA M. BEHAN, formerly VILLA M. BURKE, S. J. SIMONS, V. M. PRICE, E. J. SULLIVAN, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in this complaint adverse to complainant's title thereto,
Defendants.

## BILL OF COMPLAINT

Comes now United States of America by its solicitors acting under the instructions and at the

direction of the Attorney General of the United States and brings this Bill of Complaint against the defendant and alleges:

I.

That the places of residence of the known defendants are as follows:

James E. O'Donnell, Juanita O'Donnell, his wife, Walter E. Burke, Edmund Burke, Villa M. Behan, formerly Villa M. Burke, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, reside in the city of Los Angeles, California. [1*]

Frank Clifford Morse and Frances Morse, his wife, reside at Tacoma, Washington.

Fletcher M. Slosson and Dorothy Slosson, his wife, S. J. Simons, V. M. Price and E. J. Sullivan are residents of the City of San Francisco, California.

II.

That the Complainant, United States of America, is the owner of, and since the year 1853 has occupied as part of the Mare Island Navy Yard Reservation for public, to-wit: Military and Naval purposes, and has been in possession of, the following described land, which is situated in the County of Solano, State of California and in the Northern Division of the Northern District of California, to-wit:

All that parcel and body of land known and designated as Tract No. 38 containing 1473.95

*Page numbering appearing at the foot of page of original certified Transcript of Record.

acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering Fractional Township 3 North, Range 4 West, M.D.B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the Defendants claim, within its northerly portion, a strip or lot of ground purported to have been surveyed in the year 1856 on behalf, and under the authority of, the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 containing 164.55 acres and designated as a fractional portion of the south one-half of the southeast quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township, 3 north, range 4 west, M.D.B. and M.

That said last mentioned land, together with all accretions, natural or artificial, appertaining thereto or to any part thereof, is the specific land and area involved in this suit; that said last mentioned purported subdivisional descriptions designated as State Swamp and Overflow Land Survey No. 34 are null and void and that no such tracts or parcels or pieces of land exist or are delimited or show upon [2] any approved and accepted United States public land survey, map or plat.

III.

That by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Government of Mexico to one Victor Castro of Mare Island which then included and now embraces the land above described; a copy of which said grant is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint. Said instrument was filed for record in the office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island then being within and a part of said Sonoma County, and George W. P. Bissell, and William H. Aspinwall having succeeded by mesne conveyances, to the rights and title of said Victor Castro under said grant, filed in the office of the Board of Land Commissioners, empowered to ascertain and settle private land claims in the State of California, their petition seeking the confirmation to them of their title to the lands included in said grant to Victor Castro as set out herein, and such proceedings were thereupon had before said Board of Land Commissioners including the taking of evidence, that a decree was duly given, made and entered by said Board, confirming to the said Petitioners, their right and title in and to the lands included in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al, v. United States. In this case, on hearing the proofs and

allegations, it is adjudged by the Commission that the claim of the said Petitioners herein is valid, and it is therefore decreed that their application for a confirmation thereof be allowed.

"The place of the confirmation as hereby given is situate in the Bay of San Francisco and is called 'Isla DeLa Yegua' or 'Mare Island' and being an island is bounded by the water's edge.

R. Aug Thompson
S. B. Farwell, Commissioners.
George Fisher, Sec'y.

Filed in office May 8, 1855" [3]

IV.

That the said Board of Land Commissioners was vested with power and authority to make such confirmation by the Act of Congress approved March 3, 1851, (9 Stats. 631) and pursuant to the terms of section 8 of which Act said petitioners, Bissell and Aspinwall, claiming said Mare Island in California under right and title derived from the Mexican Government did present the same to the said Board of Land Commissioners, together with evidence in support of such claim and said Board thereupon did pass upon the evidence so produced and upon the evidence produced in behalf of the United States, and did determine the validity of such claim, and within thirty days after such decision did certify the same with the reasons therefor, to the District Attorney of the United States for

the District of California, in which such decision was rendered.

That pursuant to the terms of section 9 and 10 of said Act, the United States, by its District Attorney, duly presented its petition to the United States District Court for the District of California, in the District in which said land was situated, praying a review of said decision and decree of said Board of Land Commissioners, and for a decision on the validity of said claim and duly complied with the law and requirements governing such petition for review. And the said George W. P. Bissell, and William H. Aspinwall, filed their Answer thereto and thereafter such proceedings were had in such matter that on March 2, 1857, the said District Court of the United States for the District of California, duly gave and made its Order for Judgment in said cause, confirming the said grant and the said decision of the said Board of Land Commissioners, and thereafter on April 15, 1930, the District [4] Court of the United States for the Northern District of California, the successor to said Court duly gave and made its judgment and decree, confirming said decision and decree of said Board of Land Commissioners, and directing the entry of said decree nunc pro tunc as of the 2nd day of March, 1857, a copy of which decree is hereto attached marked Exhibit "B" and referred to and made a part of this bill of complaint. Defendants are remote claimants under, successors to, and in privity with, the United States of America, plaintiff and appellant in said appeal from the decision of said Board of Land

Commissioners, against which plaintiff and appellant said judgment and decree was entered with respect to sovereign and paramount title then and there asserted and claimed by said plaintiff and appellant, and defendants are bound by said decree.

V.

That the United States of America acquired the title and interest of George W. P. Bissell and William H. Aspinwall in and to the land so conveyed and confirmed to them, and also the title and interest of Mary S. McArthur in said land, as a tenant in common with the said Bissell and the said Aspinwall, by purchase for a valuable consideration, namely: $83,491.00, and received a deed of conveyance of said property executed January 4, 1853, a copy of which is hereunto annexed and marked Exhibit "C" is referred to and made a part of this Bill of Complaint. And said deed was duly filed for record and recorded in the Recorder's office of Solano County, California, on April 18, 1853, said Solano County being then and thereafter the County in which said lands were situated.

VI.

That on November 6, 1850, the President of the [5] United States by Executive Order, reserved to the United States for military and naval purposes from entry by private persons, among others, the following tract of land on San Francisco Bay:

Mare Island, [Northward to a point parallel to the Northern boundary of Mare Island].

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of Section 3 of the Act of August 31, 1852 (10 Stats. 104), selected the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land, ordinarily reported to belong to said island and the harbors, waters and anchorages connected therewith, and necessary to the use of the same and within which is included the lands and premises described in paragraph II of this Bill, as a site for the Navy Yard and Naval Depot provided for by said Act of Congress.

Following said selections, the Secretary of the Navy on February 9, 1853, recommended to the President of the United States, that said land and premises be reserved for public use, and on February 11, 1853, President Millard Fillmore approved said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his Order making such reservation is attached hereto, marked Exhibit "D" and hereby referred to and incorporated in this Bill of Complaint. From time to time, the Congress of the [6] United States of America duly approved,

ratified and confirmed said reservations and by various statutes, appropriated large sums to improve the lands comprised therein and authorized their improvement.

VIII.

That the lands and premises described in paragraph II of this Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California under the rule and occupation of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court as aforesaid, to George W. P. Bissell and William H. Aspinwall and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

IX.

That ever since September 16, 1853, the United States has occupied the land described in Paragraph II of this Bill, by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval Station, Navy Yard and premises of complainant, situated thereon.

That the possession of the United States of America has at all times been actual, open, adverse and exclusive and under claim of right and of absolute ownership in fee of said land, and under the

title and color and claim of title supplied by said reservations and the said deed of January 4, 1853, the said decision of the said Board of Land Commissioners of May 8, 1855, the said Order of the said District [7] Court of the United States for the District of California duly given and made March 2, 1857, and said Decree of April 15, 1930. The lands described as claimed by the Defendants in Paragraph II of this Bill, during such period and occupancy of the complainant, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located upon the northerly portion of said land described in paragraph II of this Bill, a Marine Corp Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a causeway to the Navy Yard, an overseas freight shipment transit shed, Navy Yard scrap bins and storage, electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other improvements, buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000. and used by the Complainant for the operation and activities of its Naval and Military forces.

X.

That the lands in question heretofore described in Paragraph II hereof, were claimed by the State of California, under and by virtue of the Act of Sep-

tember 28, 1850 (9 Stats. 519) commonly known as the "Swamp Land Act," by which the whole of those Swamp and Overflowed Lands, made thereby unfit for cultivation, comprising part of the public domain of the United States of America on the date of the passage and approval of said Act, and remaining unsold, were granted to the State. Said lands were purportedly surveyed in the year 1856 under authority of the State of California, and identified by such survey as Survey No. 34 and as containing 164.55 acres [8] in area, and thereafter the State of California issued its patent purporting to convey said lands included in said survey to David N. Darlington, under date of March 18, 1857, a copy of which patent is hereto annexed marked Exhibit "E" and referred to and incorporated in this Bill of Complaint.

XI.

That defendants herein named, and each of them, claim title or some right, title or interest, the exact nature and extent of said claims being unknown to complainant, in and to the lands described in said purported survey No. 34 and in Paragraph II of this Bill through and by virtue of mesne conveyances, vesting in them the purported title of the said David N. Darlington, or some part or parcel thereof. Defendants and each of them claim some right, title or interest in said real property adversely to the right and title of plaintiff, but each of said claims is

wholly without right or foundation in law or fact; that there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of this Complaint, adverse to the complainant's ownership, and casting a cloud upon the complainant's title therein; that the claims of said persons are wholly without right or merit in law or in fact.

That complainant is without information as to the dates, tenure and contents of the instruments constituting evidences of the alleged title of the defendants other than as stated herein and is unable therefore, to set out herein such instruments held by them.

XII.

That on March 9, 1928, a purported patent was issued to the State of California, which alleged patent is in [9] effect, an attempted conveyance of the lands, secondly and lastly mentioned and described in Paragraph II of this Bill of Complaint, a copy of which said purported patent, hereto annexed is marked Exhibit "F" and is referred to and made a part of this Bill of Complaint. That said purported patent was issued under and pursuant to an order dated March 8, 1928, by the then Secretary of the Interior, directing that a patent issue to the State of California in accordance with a preemptory Writ of Mandamus, issued on March 6, 1928 out of the Supreme Court of the District of Columbia, in an action at law therein, namely No.

70,226, entitled, "The United States of America, ex rel James E. O'Donnell, relator, vs. Hubert Work, Secretary of the Interior, Respondent," a copy of which said Order is hereto attached and marked Exhibit "G" and is referred to and made a part of this Bill of Complaint, and a copy of said Writ is hereto annexed marked Exhibit "H" and is referred to and made a part of this Bill of Complaint, and thereafter the Secretary of the Interior made and filed his return to said Writ of Preemptory Mandamus, a copy of which return is hereto annexed and marked Exhibit "I" and is herein referred to and made a part of this Bill of Complaint. But Complainant says that said alleged patent to the State of California is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership under and by virtue of the aforesaid grant from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act and were not a part and never had been a part of the public domain of the United States or been opened for entry by private persons or subject to the aforesaid Swamp Land grant, but have at all times since [10] the date of said Mexican grant to Victor Castro, been owned and occupied by complainant as proprietor and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that said land had been selected for and devoted to the necessary public purpose of

the United States and withdrawn from entry by private persons as alleged in Paragraphs 6 and 7 of this Bill of Complaint, long prior to the issuance of said purported patent to the State of California, and while the legal title in and to said lands was vested in the United States of America; and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion or determination of said Hubert Work, as Secretary of the Interior or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officers or either of them or of the President of the United States, which said officials are by law, charged with the duty and responsibility of caring for, protecting, disposing of and awarding patents for, or other evidences of title to, the public domain and any part thereof; and for the further reason that the descriptions in said alleged patent are null and void and designate no tracts or parcels of land shown or delimited on any approved and accepted United States public land survey, map or plat;

That the only final, recognized, approved and accepted United States public land survey, map or plat of that portion of Mare Island contained within

Fractional Township 3 North, Range 4 West, M. D. B. and M.,

and showing tracts and parcels of land therein and controlling all description of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and

accepted in 1923, a true reproduc- [11] tion of which is hereto attached and marked Exhibit "J" and referred to and made a part of this Bill of Complaint;

That upon said map and plat are shown no subdivisions, tracts or parcels of land such as are mentioned in said purported patent of 1928 to the State of California, and no survey No. 34, and no lots, tracts or subdivisions corresponding to said subdivisional descriptions contained in the purported patent.

XIII.

The true names of defendants sued herein as First to Tenth Doe inclusive, and the interests claimed by them respectively to the lands described in Paragraph II of this complaint are unknown to complainant, and complainant prays that when their true names and the interest claimed by them respectively are ascertained, they may be inserted herein with the same effect as if such defendants were sued in such true names originally.

XIV.

Complainant is without adequate remedy in the premises at law; wherefore that the defendant may full, true, direct and certain answer make to each and all of the allegations and averments in this Bill of Complaint but not under oath, complainant prays:

(1) That the court adjudge and decree that complainant is the owner in fee simple, absolute, and

possessed of all of the real property described in Paragraph II of this Bill of Complaint.

(2) That the Court adjudge and decree that neither the defendants nor any of them ever acquired or now have any right, title or interest in or to the lands described in Paragraph II of this Complaint or any part thereof by reason of [12] the purported patents, conveyance, or instruments mentioned and referred to herein.

(3) That defendants be required to answer and set up the conveyances, instruments, or evidences of title under which they claim, and that the Court adjudge and decree that said conveyances and instruments through and by virtue of which defendants claim to derive a right, title and interest in the lands in question under David N. Darlington, patentee, from the State of California and his grantees, are void and that each such conveyance made to date held by the defendant, be surrendered for cancellation.

(4) That the title in and to the lands described in Paragraph II of this Bill of Complaint, be quieted in the Complainant as against all or any adverse claims of the defendants herein or any of them.

(5) That Complainant have such other, further or different relief in the premises as may be agreeable to equity and good conscience.

(6) That the Court grant to the complainant a Writ of Subpoena therein and thereby commanding the defendants to be and appear before the Court

on a date to be therein named then and there to abide by such decree as the Court shall make in the premises.

(Signed) GEO. J. HATFIELD,
United States Attorney,
Solicitor for the Complainant.[13]

United States of America,
Northern District of California,
City and County of San Francisco.—ss.

Elisha B. Carrier, Special Assistant to the United States Attorney for the Northern District of California, being first duly sworn on oath deposes and says:

That he is one of counsel for the complainant herein and that he has read the foregoing bill of complaint and knows the contents thereof and that he verily believes the same to be true.

(signed) ELISHA B. CARRIER

Subscribed and sworn to before me this 21st day of November, 1930.

[Seal] (signed) WALTER B. MALING,
Clerk U. S. District Court,
Northern District of California. [14]

EXHIBIT "A"

GRANT

Juan B. Alvarado, regular constitutional governor of the department of the Californias.

WHEREAS, Don Victor Castro, a Mexican by birth, has petitioned to this government for the ownership of the island named 'La Yegua', situated in the neighborhood of the straits of Carquinez, in consequence of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being in charge of this government, and in virtue of which the petitioner has repleaded his petition, proving that said island does not belong to the ownership of any individual or corporation. I have in decree of this day declared, as I do by these presents declare, Don Victor Castro owner in fee of the said island, in all its extents, conformably with the powers conferred on me by the supreme national government.

In consequence let this be delivered to the party interested, that it may serve him for a title, and for such other purposes as may be convenient.

Given in Monterey, capital of the department, on the twentieth day of the month of May, 1841.

(Signed) JUAN B. ALVARADO

[15]

EXHIBIT "B"

In the Southern Division of the United States District Court for the Northern District of California

No. 311

Transcript No. 307 Mare Island

UNITED STATES OF AMERICA,
Appellant,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,
Appellees.

On appeal from the final decision of the Board of Land Commissioners to ascertain and settle private land claims in the State of California under the Act of Congress, approved on the 3rd day of March, 1851.

DECREE NUNC PRO TUNC

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in the State of California, under the Act of Congress, approved the third of March, A. D. 1851, upon the transcript of the proceedings and the decision of said Board of Commissioners confirming the claim of the Appellees and the predecessors in interest, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said tran-

script has been duly filed according to law, and Counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged, and decreed, that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the said "Isla De LaYegua" or "Mare Island" with its natural boundaries.

IT FURTHER APPEARING by the minutes, records and proceedings of this court, that on March 2nd, 1857, the above entitled Court made its Order duly entered in the minutes of said Court, directing the entry of a Decree of Confirmation in the above entitled matter by consent of the United States District Attorney, and that by accident, oversight, inadvertence or excusable neglect, no decree in conformity with said Order and Judgment has as yet ever been entered herein, and that the files of the Clerk of this Court contain an unsigned decree confirming the said decision of the said Board of Land Commissioners, and that this case is still pending and undecided herein;

AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything

that has been done therein, and therefore, that no rights of third persons have intervened or could intervene. [16]

NOW, THEREFORE, on motion of Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, Attorney for said Appellant, made on the 15th day of April, 1930, that a decree be entered Nunc Pro Tunc in conformity with the said Order, and the Court now being fully advised in the premises, the said Motion is hereby granted and it is hereby ordered that this decree of confirmation in said cause confirming in all particulars the decision of said Board of Land Commissioners be entered Nunc Pro Tunc, as of the 2nd day of March, in the year 1857.

Dated in open Court this 15th day of April, 1930.

A. F. ST. SURE

United States District Judge.

Endorsement:

Filed and entered April 15, 1930, Nunc pro tunc as of March 2, 1857.

Walter B. Mailing, Clerk,

By J. A. Schaertzer, Deputy.

[Endorsed]; Entered in Vol. 25, Judg. and Decrees at Page 267. [17]

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## EXHIBIT "C"

To all to whom these presents shall come:

George W. P. Bissell, of the city of San Francisco, in California, William H. Aspinwall of the

city of New York, in the State of New York, and Mary S. McArthur, of the city of Baltimore, Maryland, send greetings:

Whereas, the said parties, as tenants in common, are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a navy yard, and for the public use, on behalf of the United States of America, and which has recently been selected for such purpose; and the interests and proportions of the said owners respectively, in the said island, are as follows, that is to say: Of the said George W. P. Bissell, fifty-eight eightieth parts and one-fourth of an eightieth part (the whole being divided into equal eightieth parts); the said William H. Aspinwall, sixteen and three-fourths eightieth parts, and the said Mary S. McArthur, as sole devisee of William P. McArthur, deceased, of the remaining five eightieth parts.

And they have agreed to convey the same to the use of the United States of America, for the consideration hereinafter expressed paid to them severally and respectively, according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now these presents witness: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur, in consideration of the sum of eighty-three thousand four hundred and ninety-one dollars, to them paid, in proportion to their said interests respectively, on behalf of the United States

of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released and quit-claimed and by these presents do grant, bargain, sell, release, and quit-claim unto the United States, all that tract of land and island called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the navy yard there, including all the tule or lowland, and marsh, belonging to the same, or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever, with the mutual agreements that the said grantor shall have the right of establishing a ferry to and from said island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select, with the assent and approval of the Secretary of the Navy of the United States, for the time being, on the report of the officer or officers at the time representing the Navy Department at San Francisco; for the landing of which ferry, on the said island, a piece of land on the margin and shore of the said island, to be selected and located by the said grantors, their heirs and assigns, with

such assent and approval as last aforesaid; however, ferry privilege and landing place shall be subject to the following control and restrictions, on the part of the United States: [18]

That the said ferry and landing place shall at all times, for the purpose of police and the regulations of persons and things in the navy yard, be subject to such orders as the Secretary of the Navy, or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said navy yard and Mare Island; and also, that no building of any kind shall be erected on the landing place without such consent as aforesaid; and also if the Secretary of the Navy, for the time being shall for the security or advantage of the United States, in reference to the said public use of Mare Island, require a removal of the said ferry landing to any other convenient place on the eastern shore of said Mare Island, for the purpose of such landing place, the landing of the said ferry shall be removed to such new landing place, and the ferry privilege shall apply to such new landing place, and all other terms hereof in relation thereto; and soon, from time to time, as changes in this respect may be found necessary on part of the United States; and on every such change it shall be lawful for said grantors, their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purpose of the ferry and on the direction of the Secretary of the Navy, for the time

being, it shall be the duty of the said grantors, their heirs and assigns to conform to such removal with all convenient speed. And the said grantors for themselves, according to their several interests aforesaid, and each for his heirs and assigns, and for all claiming by or under them respectively, hereby severally covenant to and with the United States of America and their assigns, that they severally, and their heirs and assigns shall and will, at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances unto them of the premises hereby purporting to be granted, as shall be reasonably advised by their counsel learned in law.

In witness whereof the said George W. P. Bissell, by William H. Aspinwall, his attorney (by letter of attorney dated July 30th, 1852, herewith delivered), and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

G. W. P. BISSELL [Seal]
Pr. WM. H. ASPINWALL, Att'y.
WM. H. ASPINWALL, [Seal]
MARY S. McARTHUR, [Seal]

Signed, sealed and delivered
in the presence of:
WM. MARRIA,
J. O. LAWRENCE,
J. D. PRATT,
JNO. J. YOUNG,
as to Mary S. McArthur. [19]

State of New York,
New York City and County.

I, Joseph C. Lawrence, commissioner in and for the State of New York, duly appointed and commissioned by the Governor of the State of California to take the acknowledgements and proof of deeds and other instruments of writing under seal, to be used or recorded in same State of California, and to administer oaths and affirmations, do hereby certify that on the day of the date hereof before me personally came William H. Aspinwall, in his individual capacity and as the attorney in fact of George W. P. Bissell, the persons described in and who executed the foregoing deed of conveyance, and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell, one of the parties therein described, by virtue of a power of attorney, duly executed by the said George W. P. Bissell, for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

[Seal] JOSEPH C. LAWRENCE
Commissioner of the State of California,
in and for the State of New York.
68 Water Street, New York.

State of Maryland,
City of Baltimore.—ss.

On this 5th day of January, A. D., 1853, before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me, and having signed and sealed the same before me, acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

JABEZ D. PRATT
Commissioner for California.

State of California,
County of Solano.—ss.

The foregoing instrument of writing was received by me for record on the 18th day of April, A. D. 1853, at 9 o'clock a. m.

JAS. P. VAUGHN,
County Recorder. [20]

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EXHIBIT "D"

Navy Department
February 9, 1853

Sir: By the 3rd section of the act of last session, Chapter CIX, Statutes at Large, making appropria-

tions for the naval service, the Secretary of the Navy is "authorized and directed to select a site for a navy yard and naval depot in the Bay of San Francisco, in California, or neighboring waters either by purchase or reservation of public lands.

I have the honor to inform you that acting in pursuance of this authority I have it in contemplation to select Mare Island, in the Bay of San Francisco, as the site for the navy yard and depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of this island. My own opinion is that whether the title should be found to exist in the United States or not it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The act of Congress above referred to authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San

Pablo, the Straits of Carquinas and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land, ordinarily reported to belong to said island, & the harbors, waters, anchorages connected therewith, and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your obt. servt.

JOHN P. KENNEDY.

The President.

The President of the United States endorsed upon said paper the following:

"The reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate department that the resolution may be properly and legally recorded.

*reservation* (Sgd.) MILLARD FILLMORE.

Washington, February 11, 1853." [21]

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EXHIBIT "E"

United States of America, State of California:

To All To Whom These Presents Shall Come Greeting:

Whereas, under the provisions of an Act of Congress of the United States, approved the twenty-eighth day of September, A. D. one thousand eight

hundred and fifty, entitled an Act to enable the State of Arkansas and other States to reclaim Swamp Lands within their limits in which Act the manner of selecting and setting apart Swamp and Overflowed Lands are fully set forth,

And Whereas, in accordance with the provisions of the act of Congress the title of which is above recited the Legislature of the State of California on the twenty eighth day of April A. D. one thousand eight hundred and fifty five passed an Act entitled An Act to provide for the sale of the Swamp and Overflowed Lands belonging to this State which Act authorizes the location and disposal of a portion of the Swamp and Overflowed Lands donated to the State of California by the Act of Congress the title of which is above recited;

And Whereas it appears by the certificate of the Secretary of State bearing date the Eighteenth day of March A. D. one thousand eight hundred and fifty seven that he has been duly notified by the Treasurer of State of the State of California that David N. Darlington has paid one hundred and sixty four 55/100 dollars to the Treasurer of Solano County, State of California, in full payment for one hundred and sixty four 55/100 acres of Swamp and Overflowed Lands situated in said Solano County and described in the County Records of said County as follows, to-wit:

The south fractional half of the South East quarter of Section No. Ten—the North East fractional portion of the North East quarter of Section No.

Fifteen—the South West fractional portion of the North West Quarter of Section No. fourteen and the North East Fractional portion of the South West Quarter of Section No. Fourteen. The whole lying between San Pablo and Napa Bays in said County of Solano, and being in Township No. Three North Range No. Four West of Mount Diablo Meridian & Base and conforming to the U. S. Government Survey.

Now Therefore all the requirements of the Act of Congress as well as the Act of the State Legislature in relation to Swamp and Overflowed Lands having been fully complied with—he the said David N. Darlington has become entitled to a patent from the State of California, for the tract or parcel of Swamp or Overflowed Lands above described and there is hereby granted by the State of California to the said David N. Darlington and to his heirs and assigns forever the said described tract or parcel of Swamp and Overflowed Lands with the appurtenances—the said David N. Darlington his heirs and assigns to have and to hold forever the said described tract or parcel of Land with all the rights privileges and appurtenances unto the same belonging or in anywise appertaining.

In Testimony Whereof I, J. Nuby Johnson, Governor of the State of California, have caused these Letters to be made Patent and the Seal of the State of California to be hereunto affixed. Given under my hand at the City of Sacramento, this the eight-

eenth day of March in the year of our Lord A. D. One Thousand Eight Hundred and Fifty-seven. [22]

[Seal] J. NUBY JOHNSON

Attest: DAVID F. DOUGLASS,

Secretary of State.

The foregoing is a true copy of Patent recorded at the request of E. H. Sawyer, June 6th, 1879, at 30 min. past 11 A. M.

C. KNOX-MARSHALL,

Co. Recorder. [23]

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EXHIBIT "F"

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office of the United States, an Order dated March 8, 1928, by the Secretary of the Interior, directing that a patent issue to the State of California in accordance with a writ of peremptory mandamus issued in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled "The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior, respondent," for the following unsurveyed lands in the State of California, to-wit:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (S½) of the southeast

quarter (SE¼) of section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of Section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14) and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857.

NOW, THEREFORE, KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in accordance with said Order and writ of mandamus, HAS GIVEN AND GRANTED, and by these presents, DOES GIVE AND GRANT, unto the said State of California, in fee simple, the tracts of Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances thereto belonging, unto the said State of California, in fee simple, and to its assigns, forever.

IN TESTIMONY WHEREOF, I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the Ninth day of March in the year of our Lord one thousand nine hundred and

twenty-eight and of the Independence of the United States the one hundred and fifty-second.

By the President:

[Seal] CALVIN COOLIDGE,

By VIOLA B. PUGH,

Secretary.

M. P. LeROY,

Recorder of the General Land Office.

Record of Patents:

Patent Number 1013379.

Government Printing Office. [24]

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EXHIBIT "G"

DEPARTMENT OF THE INTERIOR

Washington

Address Only

the Secretary of the Interior

Mar - 8 1928

The Commissioner of the General

Land Office

Dear Mr. Commissioner:

The Secretary of the Interior has been served with a writ of peremptory mandamus in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior, respondent, commanding him to certify for patent to the State

of California the lands described in the writ and hereinafter described.

Accordingly, you are hereby directed to at once issue a patent to the State of California for the following unsurveyed lands:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (S½) of the southeast quarter (SE¼) of section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14), and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857.

You will informally submit to the Solicitor for the Department the draft of the patent to be issued in pursuance hereof, which should recite that the lands are unsurveyed.

Very truly yours,

E. C. FINNEY,

First Assistant Secretary. [25]

EXHIBIT "H"

In the Supreme Court of the District of Columbia

At Law No. 70,226

THE UNITED STATES OF AMERICA, Ex Rel. JAMES E. O'DONNELL,

Relator,

vs.

HUBERT WORK, Secretary of the Interior,

Respondent.

WRIT OF PEREMPTORY MANDAMUS.

District of Columbia—ss.

The United States of America,

To Hubert Work, Secretary of the Interior, Greeting:

WHEREAS, it was lately and in the above entitled proceeding, represented to our Supreme Court, that you, the said Hubert Work, as Secretary of the Interior, had failed to perform the certain duty imposed on you by law, namely, that you had refused to certify for patent to the State of California the certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the South half (S½) of the Southeast Quarter (SE¼) of Section Ten (10); the Northeast fractional portion of the Northeast Quarter (NE¼) of Section Fifteen (15); the Southwest fractional portion of the Northwest Quarter (NW¼) of Section

fourteen (14), and the Northeast fractional portion of the Southwest Quarter (SW¼) of Section Fourteen (14) in Township Three (3) North, Range Four (4) West, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857, which said lands heretofore on the application of the State of California for certification for patent as passing to the State of California under and pursuant to the Act of Congress of September 28, 1850, you had duly determined as being swamp and overflowed under said Act, and had accordingly passed to said State; yet you, notwithstanding the same had refused to perform your said duty imposed on you by law, namely, to certify to said State for patent, said lands; and thereon and heretofore the said relator claiming under the title of California, sued out his Writ of Alternative Mandamus in this Court requiring you to show cause *by* Peremptory Writ should not issue; and you having duly answered, and issue having been duly joined, and the same after full hearing and consideration being submitted to the undersigned for consideration and determination, and later an order having been duly entered herein directing that this Peremptory Writ of Mandamus issue,

You are hereby commanded, and within sixty days after this Writ is served on you, to certify for

patent to the State of California the above described lands and make return to this Court concerning your action.

WITNESS the Honorable WALTER I. McCOY, a Justice of our Supreme Court in the year 1928, A. D., and on the 6th day of March, 1928. [26]

FRANK E. CUNNINGHAM, Clerk.
Clerk of the Supreme Court of the District of Columbia,
By Alf G. Beehrman, Ass't Clerk.

Let the Writ issue

WENDELL P. STAFFORD,
Justice

No objection as to form

NAT M. LACY,
Attorney for Respondent.[27]

## EXHIBIT "I"

In the Supreme Court of the District of Columbia.

At Law No. 70,226.

THE UNITED STATES OF AMERICA,
Ex rel. JAMES E. O'DONNELL,
Relator,

vs.

HUBERT WORK,
Secretary of the Interior.
Respondent.

## RETURN TO WRIT OF PEREMPTORY MANDAMUS.

To the Chief Justice and the Associate Justices of said Court:

The respondent, Hubert Work, as Secretary of the Interior, shows to the Court that on March 6, 1928, there issued out of the above-entitled Court a writ of peremptory mandamus which was duly served upon this respondent and which commanded official action on his part as follows, to wit:

"You are hereby commanded, and within sixty days after this writ is served on you, to certify for patent to the State of California the above described lands and make return to this Court concerning your action."

Thereupon and on March 8, 1928, he directed the Commissioner of the General Land Office to issue a patent to the State of California for the lands described in said peremptory writ of mandamus, and

on March 9, 1928, in obedience to said writ there was issued by the General Land Office Patent No. 1,013,379 in favor of the State of California giving and granting thereunto in fee simple said lands in the following language:

WHEREAS, There has been deposited in the General Land Office of the United States, an Order dated March 8, 1928, by the Secretary of the Interior, directing that a patent issue to the State of California in accordance with a writ of peremptory mandamus issued in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled "The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior respondent," for the following unsurveyed lands in the State of California, to wit:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (s½) of the southeast quarter (SE¼) of Section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14), and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same

by the State of California to David H. Darlington, March 18, 1957.

That the foregoing constitutes a full and complete compliance with the mandate of this Court by respondent and nothing further [28] remains by him to be done in the premises.

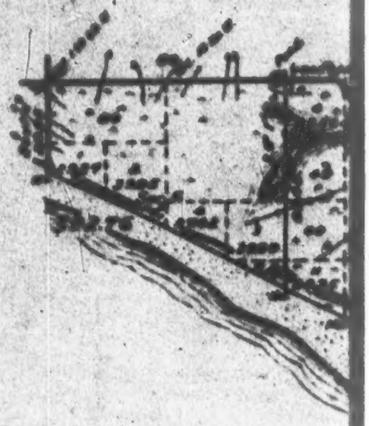
WHEREFORE respondent prays that he be exonerated and held free from any further responsibility under said writ.

EDWARD C. FINNEY,
Acting Secretary. [29]

No. 3 North Range No. 4 West Mount Diablo Meridian, California

Exhibit "J"

Frac. Township No. 3



(Excepted) F

30

[Title of Court and Cause.]

## ANSWER OF DEFENDANT EDMUND BURKE

Now comes the defendant Edmund Burke, who, for his answer to the bill of complaint herein, says as follows:

I. That the residences of the defendants are as alleged in Paragraph I of the bill of complaint herein.

II. Denies that the plaintiff is the owner of the premises described in Paragraph II of the bill of complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island as herein detailed, premises lying northerly of said parallel, and in connection therewith this defendant alleges that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857 and the same lands being included in a survey made by the authority of the United States pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States [31] to California, issuing the 9th day of March, 1928 and being part of Island

No. 1 as depicted on this defendant's Exhibit "A", a copy of which is attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing this defendant alleges that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28, 1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith this answering defendant disclaims any right or interest in or to tract 38 as depicted on the survey attached to plaintiff's bill of complaint south-

erly of a parallel as established by the Cession Act by the State of California to the United States of America dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its bill of complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, this defendant alleges that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become [32] part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island whose northerly boundary is the line of the upland of Mare Island existing in 1852 as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey referred to in plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III. Alleges (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was

never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851 and its amendments before the issue of the federal patent to California, and in connection therewith this defendant alleges said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV. Answering Paragraph IV of the plaintiff's bill of complaint defendant deems it unnecessary to argue or to answer the legal conclusions set forth therein.

V. Answering Paragraph V of the bill herein, this defendant deems it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34 or any part thereof.

VI. Answering Paragraph VI of the plaintiff's bill, this defendant alleges (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

[33]

VII. Alleges the executive order referred to in Paragraph VII of plaintiff's bill (a) was void;

(b) it did not embrace the premises embraced in said survey No. 34 or any part thereof.

VIII. Denies specifically each and every allegation contained in Paragraph VIII of plaintiff's bill, and in connection with the same, reiterates each and every one of the foregoing allegations.

IX. Answering Paragraph IX of plaintiff's bill, this defendant alleges that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 plaintiff was without legal capacity to maintain any legal action or equitable proceeding to recover possession of said premises, or to quiet his title to or in said premises, and this defendant had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents, or attorneys; that this defendant and his predecessors in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X. Admits that the lands embraced in survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by its authority and identified as survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admits that a copy of said patent is attached to plaintiff's bill, and in connection there-

with this defendant alleges that by mesne conveyances from said Darlington this defendant as a tenant in common has succeeded to a 1/30 undivided interest in common thereof with his codefendants, and as such tenant in common is entitled to the possession of said premises and admits generally the allegations contained in said Paragraph 10; this answering defendant further alleges said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars. [34]

XI. Answering Paragraph XI of the plaintiff's bill, this defendant reiterates all of his foregoing allegations, but deems it unnecessary to answer the legal conclusions and arguments set forth therein, and in connection therewith refers to Paragraph 12 of this answer.

XII. This defendant deems it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's bill, but in connection therewith reiterates all of his foregoing allegations, and further and in connection therewith admits that March 9, 1928 the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent inured to defendant, and which patent by relation is of the date of September 28, 1850, and further admits that a copy of the same is attached to plaintiff's bill of complaint herein marked Exhibit "F", and further and in connection therewith, this defendant alleges that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a col-

lateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction concerning the subject matter set forth, and further and in connection therewith this defendant denies said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but alleges said premises were a part of the public domain on September 28, 1850, and further and in connection therewith denies that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, this defendant alleges that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent issued by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith defendant alleges he [35] has by mesne conveyance succeeded to 1/30 undivided interest in said premises as a tenant in common with his co-defendants, and as such tenant in common is entitled to the possession of the same.

XIII. This defendant deems it unnecessary to

make answer to the allegations in Paragraph XIII of plaintiff's bill.

Further, this defendant admits the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection alleges that said admission is for the matter of pleading only, this defendant reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith this defendant alleges that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendant makes and does not waive. Further and in connection with all of the foregoing this defendant alleges that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station on Napa River, the said first station being designated on Freeman's Survey as station No. 54 to said second station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No.

34", closely approximate the said parallel intersecting the northerly highlands of Mare Island as depicted on defendants Exhibit "B"; that a copy thereof is hereto attached marked Exhibit "C" and is hereby referred to and made a part of this answer. [36]

WHEREFORE, defendant prays:

1. That plaintiff's bill be dismissed.

2. That defendant's title be quieted as against plaintiff and that it be decreed he is entitled to the possession of said premises and that he be placed in possession thereof.

EDMUND BURKE
Attorney pro se

State of California,
County of Los Angeles.—ss.

EDMUND BURKE, being duly sworn, deposes and says:

That he is a defendant herein; that he has read the foregoing answer and knows the contents thereof and verily believes the same to be true.

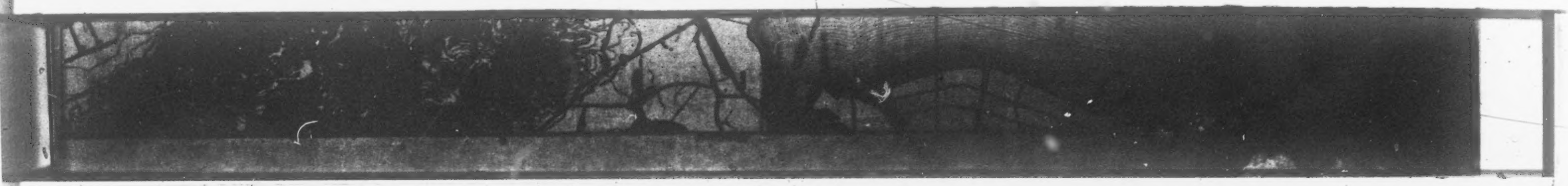
EDMUND BURKE

Subscribed and sworn to before me this 6 day of January, 1931.

[Seal] HAROLD E. THOMAS
Notary Public in and for the County of Los Angeles, State of California. [37]

4 a

CALIFORNIA
MARE ISLAND QUADRANGLE



# THE TOPOGRAPHIC MAPS OF THE UNITED STATES

...Survey is making a detailed ... of the United States. This work has been in ... 1888, and its results consist of published maps of ... per cent of the country, exclusive of outlying ...

...ublished in the form of maps on ... about 14½ by 20 inches. Under the general ... the country is divided into quadrangles bounded ... of latitude and meridians of longitude. These ... mapped on different scales, the scale selected ... being that which is best adapted to ground use in ... part of the country, and consequently, though the ... ion of nearly uniform size, they represent areas ... ent. On the lower margin of each map are printed ... showing distances in feet, meters, and miles. In ... scale of the map is shown by a fraction expressing ... ratio. Some measurements on the map and ... between on the ground. For example, the scale ... 1 mile on the map (such as 1 inch, 1 foot, or 1 ... 63,360 similar units on the earth's surface.

... areas are surveyed and ... maps are ... published on special scales for special purposes, the ... topographic surveys for the United States proper and ... maps have for many years been divided into three ... classed as follows:

... of areas in which there are problems of great ... —relating, for example, to mineral development, ... or reclamation of growing areas—are made with ... accuracy to be used in the publication of maps on a ... 1 inch = one-half mile), with a contour interval of ...

... of areas in which there are problems of average ... areas, such as most of the basin of the Mississippi ... ...ains, are made with sufficient accuracy to be used ... ...ation of maps on a scale of $\frac{1}{62500}$ (1 inch = nearly ... a contour interval of 10 to 25 feet.

... of areas in which the problems are of minor ... ...ance, such as much of the mountain or desert ... ...ions of Nevada or New Mexico, are made with sufficient ... to be used in the publication of maps on a scale of ... nearly 2 miles), with a contour interval of 25 to ...

...his survey of Alaska has been in progress about ... nearly 27 per cent of its area has now been mapped. ... part of the Territory has been covered by reconnaissance maps on a scale of $\frac{1}{625000}$, or about 10 miles to an ... ...of the remaining area surveyed in Alaska has been ... on a scale of $\frac{1}{250000}$, but about 4,000 square miles ... surveyed on a scale of $\frac{1}{62500}$.

... of the Hawaiian Islands has been surveyed, and ... maps are published on a scale of $\frac{1}{62500}$.

... shown on these maps may be arranged in three ... ...ups, including seas, lakes, rivers, canals, swamps, ... ...ions of water; (2) relief, including mountains, ... and other features of the land surface; (3) culture ... ...ial), such as towns, cities, roads, railroads, and ... boundaries. The topographic signs used to represent these features are shown and explained below. Wherever space permits, some other maps and additional features are represented in more special ways.

All the water features are represented in blue, the smaller streams and ponds by single blue lines and the larger streams, the lakes, and the sea by blue tints. Intermittent streams—those which run dry for a large part of the year—are shown by broken blue lines and dashes.

Relief is shown by contour lines in brown, which on some maps are supplemented by shading showing the effect of light drawn from the northwest across the map symbolically, for the purpose of giving the appearance of relief and thus aiding in the interpretation of the contour lines. A contour line represents an imaginary line on the ground (a contour) every point of which is at the same distance above sea level. Such a line would be drawn on any hillside, but its position only the specific area is certain regular intervals of altitude are chosen. The line of the contours itself is a contour, the datum or zero of altitude being mean sea level. The 20-foot contour would be the shore line if the sea should rise 20 feet. Contour lines show the shape of the hills, mountains, and valleys as well as their altitude. Successive contour lines that are far apart on the map indicate a gentle slope; lines that are close together indicate a steep slope; and lines that run together indicate a cliff.

The manner in which contour lines express altitude, form, and grade is shown in the figure below.

The sketch represents a river valley that lies between two hills. In the foreground is the sea, with a bay that is partly inclosed by a hooked sand bar. On each side of the valley is a terrace line which would represent bluffs. The hill on the right has a rounded summit and gently sloping spurs separated by ravines. The spurs are connected at their lower ends by a cut cliff. The hill on the left has a steeply sloping side and a gently sloping top, and shows an inclined valley and a cut cliff. The hill on the right is represented as being forested, as indicated by the sketch by conventional trees.

The contour interval of the topographic maps is the vertical distance between successive contour lines. The smaller the contour interval the more nearly will the map represent the exact features of the ground. This interval varies according to the character of the country represented in a given map. In a flat country a map may be on a scale of 1 inch to a mile and have a contour interval of 5 feet, while in a mountainous region it may be on a scale of 1 inch to 4 miles and have a contour interval of 100 feet. Certain lines of each map are printed in heavier type than the others and are accompanied by figures showing altitude above sea level. These figures indicate the altitude of many prominent points, and certain contour lines are known as index contours. The altitudes of lakes and bench marks are given in the text. Lines which show boundaries of States, counties, and townships are also printed in heavier type than the contours. Lines which show the boundaries of land, whether public or private, and the positions of railroads, roads, and trails are printed in black type by the topographic process.

Locating and the name of each map is printed in black. Should roads, such as those of a State, county, city, land grants, railroads, or canals, not shown by conventional signs, be of sufficient importance to appear on the map, they are printed in black lines of different kinds and lengths. Should such roads be shown by double lines, one of which is conventional, they are printed in black lines. Other roads are shown by the double lines, which are printed in black, and trails are shown by dashed double lines, also printed in black.

Each quadrangle is designated by the name of a city, town, or prominent natural feature within it, and on the margin of the map are printed the names of adjoining quadrangles of which maps have been published. Over [illegible] quadrangles in the United States have been surveyed, and maps of them published. Many other quadrangles will be surveyed in the near future, and maps of them will be published as rapidly as the work can be done.

The topographic map is the type on which the geologic and mineral surveys of the quadrangles are represented. Special maps showing these features are issued together with the topographic maps for [illegible] States of the Union. Atlases of the United States have been published.

Index maps of each State and of Alaska and Hawaii, showing the area covered by topographic maps and geologic folios published by the United States Geological Survey, may be had free of charge on application to the Director, United States Geological Survey, Washington, D. C. Copies of the published topographic maps may be had at 10 cents each; some special maps are sold at different prices. A discount of 40 per cent is allowed on an order for maps amounting to $5 or more at the same time. The geologic folios are sold for 25 cents a copy each, the price being printed on the face of the folio. A discount amounting to 40 per cent is allowed on orders for 100 or more folios.

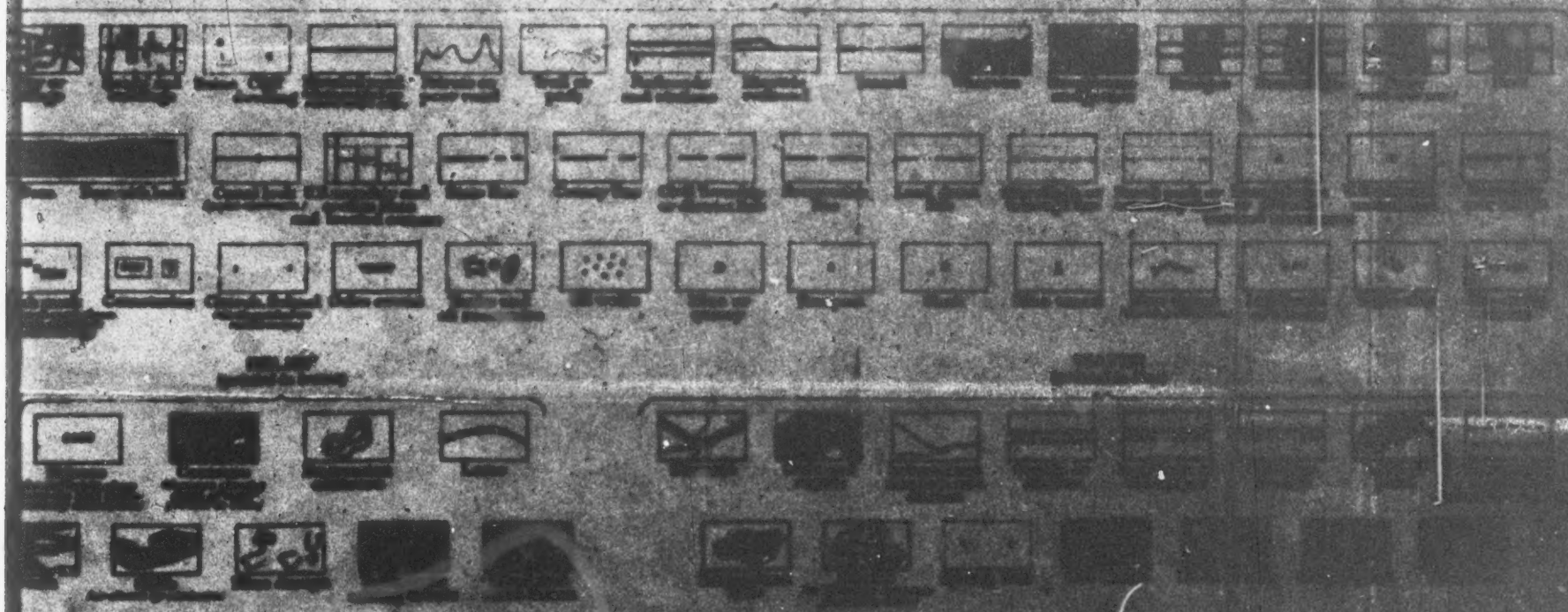
Applications for maps or folios should be accompanied by cash, draft, or money order (not postage stamps) and should be addressed to

THE DIRECTOR,
*United States Geological Survey,*
*Washington, D. C.*

January, 1904.

## CONVENTIONAL SIGNS

### CULTURE
(printed in black)



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E. P.

[redacted]

[redacted]

a The Meadow Ranch

EXHIBIT "C"
U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA

No. 610 Commercial Street

San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the W. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in them-

selves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,
U. S. Surv. Gen'l. [41]

Continuation of Exhibit "C"

In reply please refer to L/471428

DEPARTMENT OF THE INTERIOR

General Land Office
Washington, Nov. 27, 1914
:As to plat and field notes

Mr. Edmund Burke,
Hotel Sutter,
San Francisco, Calif.

My dear Sir:

Replying to your telegram of the 25th inst., plat and field notes of Survey of Mare Island, Calif., received with Surveyor's General's letter of Aug. 7, 1879, cannot be found after careful search in the different divisions.

Confirming my wire of this date, I am sending you uncertified tracing of a map of Mare Island, with boundary table in margin, which, were received in 1877, shows the same acreage which as the 1879 plat did, for which no doubt you have remitted the charge—two dollars. It should be said that the map is considered incorrect, as shown in a letter by this office to the Secretary of the Interior (E J H B)

dated September 22, 1905, and was never approved.

Very respectfully,

C. M. BURD,

Assistant Commissioner.

[Endorsed]: Filed Jan. 9, 1931. [42]

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[Title of Court and Cause.]

ANSWER OF DEFENDANT WALTER E. BURKE AS TRUSTEE FOR VILLA M. BEHAN, sometimes called Villa M. Burke.

Now comes the defendant Walter E. Burke, as Trustee for Villa M. Behan, sometimes called Villa M. Burke, who, for his answer to the bill of complaint herein, says as follows:

I. That the residences of defendants are as alleged in Paragraph I of the bill of complaint herein.

II. Denies that the plaintiff is the owner of the premises described in Paragraph II of the bill of complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island as herein detailed, premises lying northerly of said parallel, and in connection therewith this defendant alleges that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated

March 18, 1857 and the same lands being included in a survey made by the authority of the United States pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the *filed* notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928 and being part of Island No. 1 as depicted on this defendant's Exhibit "A", a copy of which is attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to [43] California App. Sept. 28, 1850, and in connection with all of the foregoing this defendant alleges that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28,

1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith this answering defendant disclaims any right of interest in or to tract 38 as depicted on the survey attached to plaintiff's bill of complaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its bill of complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, this defendant alleges that all accretions, [44] natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island whose northerly boundary is the line of the upland of Mare Island existing in 1852 as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey referred to in

plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III. Alleges (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851 and its amendments before the issue of the federal patent to California, and in connection therewith this defendant alleges said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV. Answering Paragraph IV of the plaintiff's bill of complaint defendant deems is unnecessary to argue or to answer the legal conclusions set forth therein. [45]

V. Answering Paragraph V of the bill herein, this defendant deems it unnecessary to answer the legal conclusions set forth therein since the convey-

ance therein described does not embrace the lands described in said survey No. 34 or any part thereof.

VI. Answering Paragraph VI of the plaintiff's bill, this defendant alleges (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII. Alleges the executive order referred to in Paragraph VII of plaintiff's bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34 or any part thereof.

VIII. Denies specifically each and every allegation contained in Paragraph VIII of plaintiff's bill, and in connection with the same, reiterates each and every one of the foregoing allegations.

IX. Answering Paragraph IX of plaintiff's bill, this defendant alleges that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 plaintiff was without legal capacity to maintain any legal action or equitable proceeding to recover possession of said premises, or to quiet his title to or in said premises, and this defendant had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents, or attorneys; that this defendant and his predecesosrs in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X. Admits that the lands embraced in survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1950, and that

said lands were surveyed by [46] California in 1856 under and by its authority and identified as survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admits that a copy of said patent is attached to plaintiff's bill, and in connection therewith this defendant alleges that by mesne conveyances from said Darlington this defendant as a tenant in common has succeeded to a 29/30 undivided interest in common thereof with his codefendant, and as such tenant in common is entitled to the possession of said premises and admits generally the allegations contained in said Paragraph 10; this answering defendant further alleges said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI. Answering Paragraph XI of the plaintiff's bill, this defendant reiterates all of his foregoing allegations, but deems it unnecessary to answer the legal conclusions and arguments set forth therein, and in connection therewith refers to Paragraph XII of this answer.

XII. This defendant deems it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's bill, but in connection therewith reiterates all of his foregoing allegations, and further and in connection therewith admits that March 9, 1928 the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent inured to defendant, and which patent by relation is of the date of

September 28, 1950, and further admits that a copy of the same is attached to plaintiff's bill of complaint herein marked Exhibit "F" and further and in connection therewith, this defendant alleges that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral [47] attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction concerning the subject matter set forth, and further and in connection therewith this defendant denies said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but alleges said premises were a part of the public domain on September 28, 1850, and further and in connection therewith denies that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, this defendant alleges that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent issued by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E', and further and in connection therewith defendant alleges he has by mesne

conveyance succeeded to 29/30 undivided interest in said premises as a tenant in common with his co-defendants, and as such tenant in commin is entitled to the possession of the same.

XIII. This defendant deems it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's bill.

Further, this defendant admits the textual accuracy of plaintiff's Exhibit, A, B, C, D, E, F, G, H, I, and J, but in connection alleges that said admission is for the matter [48] of pleading only, this defendant reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith this defendant alleges that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendant makes and does not waive. Further and in connection with all of the foregoing this defendant alleges that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station on Napa River, the said first station being designated on Freeman's Survey as station No. 54 to said second station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and

effect on the day the said fee simple patent issued by plaintiff to the State of California. and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island as depicted on defendants Exhibit "B"; that a copy thereof is hereto attached marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendant prays:

1. That plaintiff's bill be dismissed.

2. That defendant's title be quieted as against plaintiff and that it be decreed he is entitled to the possession of said premises and that he be placed in possession thereof.

WALTER E. BURKE
Attorney pro se [49]

State of California,
County of Los Angeles.—ss.

Walter E. Burke, being duly sworn, deposes and says:

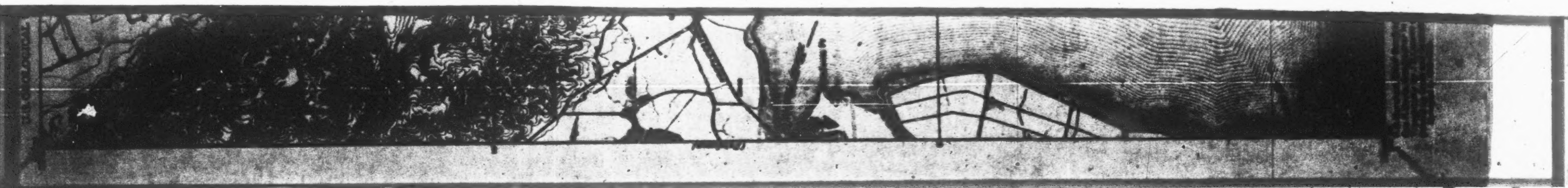
That he is a defendant herein; that he has read the foregoing answer and knows the contents thereof and verily believes the same to be true.

WALTER E. BURKE

Subscribed and sworn to before me this 6 day of January, 1931.

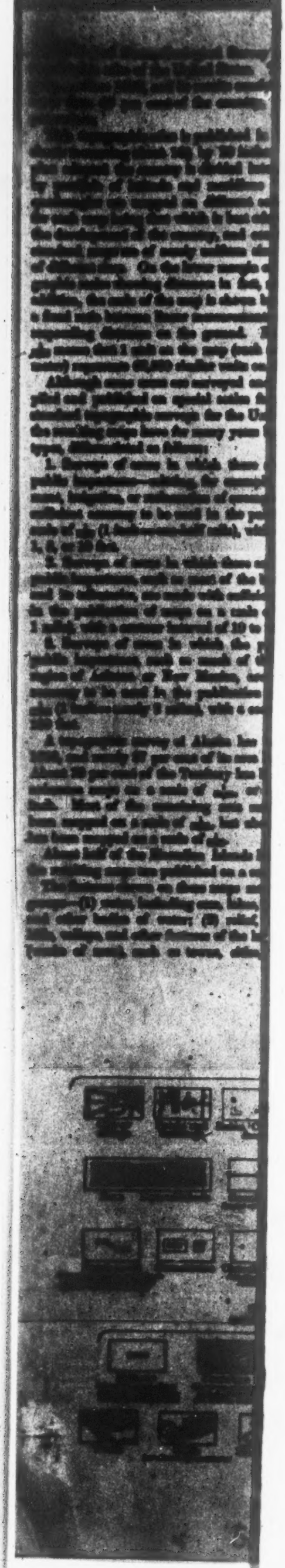
[Seal] HAROLD E. THOMAS
Notary Public in and for the County of Los Angeles, State of California. [50]

SAN PABLO
BAY



# THE TOPOGRAPHIC MAPS OF THE UNITED STATES

[illegible] published in the form of maps on [illegible] by the United States Geological Survey. This work has been in progress for [illegible] years, and the published maps of several [illegible] cover the scenery, resources of outlying [illegible]



E 1





The line of upland on the west bank side is taken from an old map of the Indian reserve. The present line of upland will be washed out from many openings made in spots.
Copy from map in U.S. Army Office, Sioux Lookout, Ont.
E. M. C.
Indian Surveyor



"a" The Mandrine Shafts

EXHIBIT "C".

U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA
No. 610 Commercial Street
San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to *Feeman* to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide

land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,

U. S. Surv. Gen'l.

[Endorsed]: Filed Jan. 9, 1931. [55]

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[Title of Court and Cause.]

ANSWER OF DEFENDANT
VILLA M. BEHAN,
sometimes called Villa M. Burke.

Now comes the defendant Villa M. Behan, sometimes called Villa M. Burke, and for her answer to the bill of complaint herein, says as follows:

That she disclaims any right, title, or interest in and to the premises described in the bill of complaint herein, except as arises through her said trustee, Walter E. Burke, and for his and her interest in the said premises this answering defendant refers to the answer herein of the said Walter E. Burke as trustee for this answering defendant.

Further defendant sayeth not.

WALTER E. BURKE
Attorney for said defendant
Villa M. Behan

[Endorsed]: Filed Jan. 9, 1931. [56]

[Title of Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS, JAMES E. O'DONNELL AND JUANITA E. O'DONNELL.

Come now the defendants, JAMES E. O'DONNELL and JUANITA E. O'DONNELL, sued and served herein as JUANITA O'DONNELL, and who, for their joint and several answer to the Bill of Complaint filed herein, say as follows:

I.

That the residences of the defendants are as alleged in Paragraph I of the Bill of Complaint herein.

II.

Deny that the plaintiff is the owner of the premises described in Paragraph II of the Bill of Complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island, as herein detailed, premises lying northerly of said parallel, and in connection therewith these defendants allege that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857, and the same lands being included in a survey made by the authority of the United

States, pursuant to the Act App. [57] July 23, 1886, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928 and being part of Island No. 1, as depicted on these defendants' Exhibit "A", a copy of which is attached to the answer of defendant, EDMOND BURKE, and made a part of his answer and, by reference, attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing, these defendants allege that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and over-

flowed on September 28, 1950 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith these answering defendants disclaim any right or interest in or to Tract 38, as depicted on the survey attached to plaintiff's Bill of Complaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America, dated May 11, 1854, and which [58] runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its Bill of Complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, these defendants allege that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island, whose northerly boundary is the line of the upland of Mare Island existing in 1852, as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey

referred to in plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III.

Allege (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851, and its amendments before the issue of the federal patent to California, and in connection therewith these defendants allege said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, [59] which patent by relation is of the date of September 28, 1850.

IV.

Answering Paragraph IV of the plaintiff's Bill of Complaint, defendants deem it unnecessasy to argue or to answer the legal conclusions set forth therein.

V.

Answering Paragraphs V of the Bill herein, these defendants deem it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34, or any part thereof.

VI.

Answering Paragraph VI of the plaintiff's Bill, these defendants allege (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII.

Allege the executive order referred to in Paragraph VII of plaintiff's Bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34, or any part thereof.

VIII.

Deny specifically each and every allegation contained in Paragraph VIII of plaintiff's Bill and, in connection with the same, reiterate each and every one of the foregoing allegations.

IX.

Answering Paragraph IX of plaintiff's Bill, these defendants allege that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928, plaintiff was without legal capacity to maintain any legal action or equitable proceeding to re-

cover possession of said premises, or to quiet his title to or in said premises, and these defendants had no legal or equitable remedy to repel the trespass of plaintiff or its officers, [60] agents, or attorneys; that these defendants and their predecessors in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X.

Admit that the lands embraced in Survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by virtue of its authority and identified as Survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admit that a copy of said patent is attached to plaintiff's Bill, and, in connection therewith, these defendants allege that by mesne conveyances from said Darlington these defendants, as tenants in common, have succeeded to a 1/30th undivided interest in common thereof with their co-defendants and, as such tenants in common, are entitled to the possession of said premises and admit generally the allegations contained in said Paragraph X; these answering defendants further allege said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI.

Answering Paragraph XI of the plaintiff's Bill, these defendants reiterate all of their foregoing allegations but deem it unnecessary to answer the legal conclusions and arguments set forth therein and, in connection therewith, refer to Paragraph XII of this answer.

XII.

These defendants deem it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's Bill but, in connection therewith, reiterate all of their foregoing allegations and further and in connection therewith, admit that March 9, 1928, the fee simple patent of the plaintiff issued to the State of California [61] for the premises described therein, which patent inured to defendants, and which patent by relation is of the date of September 28, 1850, and further admit that a copy of the same is attached to plaintiff's Bill of Complaint herein, marked Exhibit "F", and further and in connection therewith, these defendants allege that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction, the subject matter set forth; and further and in connection therewith, these defendants deny said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either

at the time of the date of the swamp land grant or otherwise, but allege said premises were a part of the public domain on September 28, 1850, and further and in connection therewith, deny that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, these defendants allege that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith, defendants allege they have by mesne conveyance succeeded to a 1/30th undivided interest in said premises as tenants in common with their co-defendants, and, as such tenants in common, are entitled to the possession of the same.

XIII.

These defendants deem it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's Bill. [62]

Further, these defendants admit the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection, allege that said admission is for the matter of pleading only, these de-

fendants reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith, these defendants allege that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendants make and do not waive. Further and in connection with all of the foregoing, these defendants allege that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station in Napa River, the said first station being designated on Freeman's Survey as Station No. 54 to said second Station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island, as depicted on defendant Burke's Exhibit "B", a copy of which is attached to the answer of defendant, EDMOND BURKE, and made a part of his answer and, by reference, attached hereto and made a part of this answer; that a copy thereof is

hereto attached, marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendants pray:

1. That plaintiff's bill be dismissed.

2. That defendants' title be quieted as against plaintiff and that it be decreed they are entitled to the possession of said premises and that they be placed in possession thereof.

KELBY & LAWSON
Attorneys for Defendants. [63]

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EXHIBIT "C"

U. S. SURVEYOR'S GENERAL'S,
CALIFORNIA
No. 610 Commercial Street
San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of

Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office, July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,

U. S. Surv. Gen'l. [64]

State of California,
County of Los Angeles.—ss.

James E. Kelby, being by me first duly sworn, deposes and says: that he is one of the attorneys for the defendants, James E. O'Donnell and Juanita O'Donnell, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

That he makes this verification for and on behalf

of the defendants for the reason that they are now absent from the County of Los Angeles, being the County wherein affiant resides and maintains his office.

JAMES E. KELBY

Subscribed and sworn to before me this 12th day of January, 1931.

[Seal] (Unsigned) .....

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within answer this 13 day of January, 1931.

GEO. J. HATFIELD,
U. S. Atty.
By E. B. C.
Attorney for Plaintiff.

Filed Jan. 16, 1931. [65]

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[Title of Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS FLETCHER M. SLOSSON, DOROTHY SLOSSON, FRANK CLIFFORD MORSE, FRANCES MORSE, ELEANOR CAROLINE WHITMAN AND ALFRED WHITMAN.

Come now the defendants Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whit-

man, her husband, and for their joint and several answer to the Bill of Complaint filed herein, say as follows:

I.

That the residences of these defendants are as alleged in Paragraph I of the Bill of Complaint herein.

II.

Deny that the plaintiff is the owner of the premises [66] described in Paragraph II of the Bill of Complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island, as herein detailed, premises lying northerly of said parallel, and in connection therewith these defendants allege that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857, and the same lands being included in a survey made by the authority of the United States, pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928, and being part of Island No. 1, as depicted on these defendant's Exhibit "A", a copy of which is attached to the answer of defendant,

Walter E. Burke, as Trustee, on file herein, and made a part of his answer and, by reference, attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing, these defendants allege that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence there- [67] of and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28, 1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith these answering defendants disclaim any right or interest in or to Tract 38, as depicted on the survey attached to plaintiff's Bill of Com-

plaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America, dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its Bill of Complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, these defendants allege that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island, whose northerly boundary is the line of the upland of Mare Island existing in 1852, as shown on the Exhibit of said Walter E. Burke, defendant, marked "B" hereby referred to and made part of this answer, the said line being the same as established by the survey referred to in plain- [68] tiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III.

Allege (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid,

did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851, and its amendments before the issue of the federal patent to California, and in connection therewith these defendants allege said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV.

Answering Paragraph IV of the plaintiff's Bill of Complaint, defendants deem it unnecessary to argue or to answer the legal conclusions set forth therein.

V.

Answering Paragraph V of the Bill herein these defendants deem it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34 or any part thereof. [69]

VI.

Answering Paragraph VI of the plaintiff's Bill, these defendants allege (a) said executive order

was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII.

Allege the executive order referred to in Paragraph VII of plaintiff's Bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34, or any part thereof.

VIII.

Deny specifically each and every allegation contained in Paragraph VIII of plaintiff's Bill and, in connection with the same, reiterate each and every one of the foregoing allegations.

IX.

Answering paragraph IX of plaintiff's Bill, these defendants allege that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 defendants herein and their predecessor and predecessors in interest and title to said premises, were without legal capacity or authority or right to initiate or maintain any legal action or equitable proceedings to recover possession of said premises or any part thereof, or to quiet their title to or in said premises or any part thereof, and these defendants, until said date, had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents or attorneys; that these defendants and their predecessors in interest and title did everything they legally could do to resist the intrusions

and trespasses of the plaintiff and its agents prior to the issuance of said federal patent of said premises to the State of California. [70]

X.

Admit that the lands embraced in Survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by virtue of its authority and identified as Survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admit that a copy of said patent is attached to plaintiff's Bill, and, in connection therewith, these defendants allege that by mesne conveyances from said Darlington these defendants, as tenants in common, have succeeded to a 40/100 undivided interest in common thereof with certain of their co-defendants and, as such tenants in common, are entitled to the possession of said premises and admit generally the allegations contained in said Paragraph X; these answering defendants further allege said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI.

Answering Paragraph XI of the plaintiff's Bill, these defendants reiterate all of their foregoing allegations, but deem it unnecessary to answer the legal conclusions and arguments set forth therein and, in connection therewith, refer to Paragraph XII of this answer.

XII.

These defendants deem it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's Bill but, in connection therewith, reiterate all of their foregoing allegations and further and in connection therewith, admit that March 9, 1928, the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent in- [71] ured to defendants, and which patent by relation is of the date of September 28, 1850, and further admit that a copy of the same is attached to plaintiff's Bill of Complaint herein, marked Exhibit "F", and further and in connection therewith, these defendants allege that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction, the subject matter set forth; and further and in connection therewith, these defendants deny said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but allege said premises were a part of the public domain on September 28, 1850, and further and in connection therewith, deny that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, these defendants allege that the township survey, including the field notes and report of the surveyor, were ap-

proved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith, defendants allege they have by mesne conveyance succeeded to a 40/100th undivided interest in said premises as tenants in common with certain of their co-defendants, and, as such tenants in common, are entitled to the possession of the same. [72]

XIII.

These defendants deem it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's Bill.

Further, these defendants admit the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection, allege that said admission is for the matter of pleading only, these defendants reserving all objections that may attend the same as tendered by these plaintiff herein, and further and in connection therewith, these defendants allege that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not com-

plete and are subject, among other things, to such objection which defendants make and do not waive. Further and in connection with all of the foregoing, these defendants allege that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station in Napa River, the said first station being designated on Freeman's Survey as Station No. 54 to said second Station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises, "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island, as depicted on defendant Walter E. Burke, Trustee's Exhibit "B", a copy of which is attached to the answer of said defendant, Walter E. Burke, Trustee, and made a part of his answer and, by [73] reference, attached hereto and made a part of this answer; that a copy thereof is hereto attached, marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendants pray:

1. That plaintiff's bill be dismissed.

2. That defendants' title be quieted as against plaintiff and that it be decreed they are entitled to

the possession of said premises and that they be placed in possession thereof.

ATHEARN, CHANDLER & FARMER
and FRANK R. DEVLIN,
Attorneys for said Defendants.[74]

State of California,
City and County of San Francisco—ss.

Fletcher M. Slosson, being first duly sworn, deposes and says:

That he is one of the defendants named in the above entitled action; that he has read the within and foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

FLETCHER M. SLOSSON.

Subscribed and sworn to before me this 24th day of January, 1931.

[Seal] M. C. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [75]

EXHIBIT "C"

U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA
No. 610 Commercial Street.
San Francisco, Aug. 7, 1879.

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879, by Bernard F. Hunley, Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in them-

selves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,
U. S. Surv. Gen'l. [76]

[Endorsed]: Service of the within by copy is hereby admitted this 24th day of January A. D. 1931.

GEO. J. HATFIELD,
Attorney for _____

Filed Jan. 26, 1931. [77]

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[Title of Court and Cause.]

STIPULATION FOR AMENDED PLEADINGS.

IT IS HEREBY STIPULATED and agreed by and between the attorneys for the respective parties, that the defendants may file amended answer or amended answers herein, and also that complainant's bill may be amended upon its face by striking out the concluding words of paragraph VI on page 6, lines 5 and 6, as follows to-wit: "Northward to a point parallel to the Northern boundary of Mare Island"; and by substituting the word "reservation" for the word "resolution" at the conclusion of com-

plainant's Exhibit D upon page 21, line 32 of the bill of complaint.

Dated: March 18, 1931.

GEO. J. HATFIELD,
United States Attorney.
I. M. PECKHAM,
Asst. United States Attorney.
E. B. CARRIER,
Special Assistant to United States Attorney,
Attorneys for comp'ainant. [78]

WALTER E. BURKE, pro se
EDMUND BURKE pro se
KELBY AND LAWSON,
Attorneys for defendants James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Edmund Burke, Walter E. Burke, as Trustee for Villa M. Behan, Villa M. Behan, formerly Villa M. Burke.

[Endorsed]: Filed Mar. 18, 1931. [79]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT AS AMENDED.

ANSWER OF DEFENDANTS, JAMES E. O'DONNELL, FLETCHER M. SLOSSON, FRANK CLIFFORD MORSE, ELEANOR CAROLINE WHITMAN, EDMUND BURKE AND WALTER E. BURKE, AS TRUSTEE, ETC.

These defendants first objecting to the sufficiency of the Bill of Complaint (a) that it does not state facts sufficient to constitute a cause of action against any or all of the defendants, (b) that it does not state facts cognizable in equity, (c) that the plaintiff has not legal capacity to maintain this suit, and reserving such objections to be first disposed of, for their joint and separate answer to the Bill of Complaint, as amended herein, allege as follows:

I.

Admit the allegations contained in Paragraph I thereof.

II.

Deny plaintiff is the owner or entitled to the possession of the premises described in plaintiff's Bill, Paragraph II, and in California State Segregation Survey No. 34 set forth in plaintiff's Exhibit "F", or any part thereof, of which premises these defendants allege they are the owners and entitled to the possession as tenants in common, as hereinafter detailed, the value of which is in excess

of Five Thousand Dollars ($5,000.00). That attached hereto, marked Exhibit I is a copy of the survey, [80] field notes and map of California Segregation Survey No. 34 (and State Survey No. 569), which is referred to and made a part of this answer. (Both showing the boundaries of the S & O Tract No. 34) and these defendants refer to plaintiff's Ex. "F" for a further description of said premises.

Further in answer to Paragraph II, defendants deny that such premises are not delimited or shown on any approved and accepted United States Public Land Survey, map and/or plat, and further in connection with the same refer to Paragraph 12 of this answer to the same and for the statement of the fact concerning the same.

III.

Alleges that the claimed grant of Mare Island by Juan B. Alvarado to Victor Castro, dated May 20, 1841, is void on its face, since it purports to grant an interdicted island (Bouldin vs. Phelps, 30 Fed. 547); further deny that any grant was ever made to said Castro as alleged in Bill herein or otherwise, or ever recorded in the office of the Recorder of Sonoma County, and that the alleged grant was a forgery and to the knowledge of plaintiff when its Bill herein was filed.

(a) That the decree of confirmation by the U. S. Land Commission is void on its face.

IV.

Allege that prior to the time of said claimed confirmation of Mare Island to Mesne, successors of

said Castro, said void confirmees had parted with their interest in said premises and the proceeding terminated on June 4, 1853, by their conveyance of said premises to plaintiff, who accepted the same, and said premises included Mare Island to the water's edge, if such grant was valid, but did not include any portion of the premises included in State Segregation Surveys Nos. 34 and 569, or either of them, or any land north of a line drawn from Station 54 to Station [81] 138 as depicted in Freeman's Survey. (Ex. "N")

(b) That the appeal of the United States from said alleged decree of confirmation, as alleged in said Paragraph, was null and void as were all the proceedings thereinafter had therein.

(c) That the exparte nunc-pro-tunc decree of confirmation entered in this Court therein is null and void on its face.

V.

That the conveyance of Bissell et als to the United States, dated June 4, 1853 is null and void on its face.

VI.

That the order of the President, dated November 6, 1850 reserving Mare Island for public use is null and void, on its face.

VII.

That the order of the President dated February 9, 1853, reserving Mare Island with all its appendages of tule and marsh, ordinarily reported to belong to Mare Island is void on its face.

VIII.

Deny the said premises purporting to be so reserved thereby for public use, or as part of the premises described in said grant and confirmations are included in the same or either or any of the same, or in other of such reservations; but on the contrary, allege:

(a) That said premises are a part of Island No. 1 embraced in said Surveys Nos. 34 and 569 as depicted on the official maps of plaintiff, copies of which marked respectively A and B are hereto attached and made a part of this answer, and as reported and depicited in the approved survey and plat of Township 4 N R 4 W, M.D.B. & M. accepted November 8, 1923 and were a part of the public domain on September 28, 1850, and were S. & O. [82] lands embraced in the S. & O. land grant to California at that date.

(b) That said premises were not (or any part thereof) within the exterior boundaries of Mare Island, but north of the Northern boundary of Mare Island as established officially by United States Surveyor General Wagner, within his jurisdiction to so establish; that a copy of said decision is hereto attached, and marked Ex. "M", and made a part of this answer; that the Survey to which he referred is hereto attached, marked Exhibit "N" and made a part of this answer.

IX.

Deny each and every allegation in Paragraph 9.

X.

Deny each and every allegation set forth in Paragraph 10 of said Bill of Complaint, and further in connection with all of the foregoing, these defendants further allege:

(a) Deny the possession of plaintiff, if any, of said premises No. 34, or any part thereof, were or are adverse since the legal title of said premises did not pass from the United States and inure to these defendants, until March 9, 1928, which is the date of defendants' legal capacity, and which date the patent of the United States therefor issued to California.

(b) Deny the possession of plaintiff, if any, was under the title and/or color and claim of title supplied by the said deed of June 4, 1853, or by the decree of the Board of Land Commissioners and/or by said nunc-pro-tunc decree or otherwise, and they deny any information sufficient to form a belief concerning the extent or value of the improvements made on said premises by plaintiff, if any, but in connection therewith allege the plaintiff made same, if any, as a trespasser on said premises and without claim or right or color of title, and without and against the consent of the defendants or their predecessors in [83] title, and allege that plaintiff is without right or equity in said premises, but is proceeding as a trespasser and by force of arms.

XI.

Admit the allegations set forth in Paragraph 10 of the Bill of Complaint, but in connection therewith allege that the statement in the said patent that the said lands were unsurveyed at the date of issue of said patent is untrue and was and is an error of law which is refuted by the record in which said patent is based as detailed in Paragraph 13 of this answer.

XII.

These defendants admit they claim an interest in said premises of undivided interest as tenants in common with others as the record discloses, and allege that as such co-tenants, they are entitled to the possession of said premises under Mesne conveyances from the State of California, as successors of plaintiff, extending to him under the S. & O. land grant to California of September 28, 1850.

XIII.

Allege that the patent of the United States with its recitals and descriptions issued to California March 9, 1928 determined the land was a part of the public domain on September 28, 1850, and not included in said alleged grant to Castro; deny the lands were claimed and held in private ownership by virtue of the Castro grant or otherwise; admit the lands had never been opened for entry or purchase by private persons, and especially so after September 28, 1850; deny said lands were not subject to said swamp lands grant, and in connection therewith, allege that all of the S. & O. lands within

the state were included in the swamp land grant of September 28, 1850, including the lands described in said State surveys Nos. 34 and 569; defendants allege they deem it unnecessary to answer the legal conclusions set [84] forth arguendo in said paragraph.

(a) Further answering Paragraph 12, of the Bill of Complaint, these answering defendants allege the fact in connection, identification and patenting of said premises is as follows:

Prior to September 16, 1914, California applied to the Commissioners of the General Land Office for the certification to it of the lands indefinitely represented as swamp and overflows on the plats of Townships 3 and 4, N R 4 W, M.D.M. approved March 4, 1863 (Ex. F and "G") pursuant to R. S. Sec. 2488; and the application was rejected by the Commissioner of the General Land Office on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in Sec. R. S. 2488, "or furnish information indicating that any particular part, great or less, of the lands claimed were wet and unfit for cultivation".

(b) That thereon, on or about February 15, 1915, the said commissioner pursuant to said Sec. R. S. 2488 Paragraph 5, approved instructions for the examination and investigation by the United States Surveyor General for California of the swamp and overflowed land in said townships claimed by California and to identify the location and character of the lands embraced in Segregation Surveys Nos.

34 and 569, which lands were claimed by California as S. & O. lands under said application.

(c) That thereon and pursuant to said instructions, said examination was made by the United States Surveyor General and later he reported to the Secretary of the Interior that said lands embraced in said State Surveys were swamp and overflowed, and thereon the Secretary of the Interior determined that such was the fact and said lands should be certified to California under its application made pursuant to said approved plats of March 4, 1863, (Exs. F and G), and that said premises No. 34 [85] was contiguous to Mare Island, but apart from it and said Secretary had previously approved of the plat of Township 4 N. R. 4 W, and thereupon the lands embraced in said State surveys were patented to California.

XIV.

That attached hereto and referring to and made part of this answer is Ex. "A" (Coast Survey Chart), Ex. "B", U. S. Geological Survey; Ex. "H", the approved Township plat of Township 4 N. R. 4 W, M.B.D. & M., each of said three exhibits marking said premises as included within the exterior boundaries of Island No. 1, and designating said areas as Island No. 1, and each depicting Island No. 1 and Mare Island as separate tracts of land and separate islands, and which said plats and maps and surveys were official acts of the plaintiff, duly authorized by law, and which said Ex. "H" was approved by the Secretary of the Interior; Exhibit "D", Plat of Township 3 N. R. 4 W. (before revi-

sion); Ex. "E" ibid. after revision; Ex. "G", Plat approved March 4, 1863, Township 3 N. R. 4 W., under which California made its application for certification of S. & O. lands; Ex. "H" ibid. Plat Township 4 N. R. 4 W., under which California applied for certification; Ex. "I", California State Survey No. 34, maps and field notes; Ex. "J" State Survey No. 569 ibid.; Ex. "K", Sloat Survey of Mare Island; Ex. "O", showing line of upland of Mare Island in 1852; Ex. "L", Mandamus record referred to in Bill and made part of federal patent by reference and other exhibits appear below.

XV.

That the imposing on Ex. "E" of the delimitation of the premises purporting to have reserved for public uses by said presidential orders by the Secretary, was a null and void act since both of said orders were void on their faces and without legal effect; that at the time of the making of said orders, the equitable title to the premises in controversy had passed under a grant in praesenti, to the State of California under the swamp and overflowed [86] land grant of September 28, 1850, and in addition to be a grant in praesenti, the same was a contract between the United States and California, which has inured to these answering defendants and their co-defendants, as their interests may appear, and the President of the United States was without authority in law to make such or either of said executive orders.

Further answering said Bill of Complaint, defend-

ants deny that Ex. "A" of plaintiff's bill is a copy of the grant to Castro; allege said purported grant was a forgery, and further deny that the same was ever presented to said United States Land Commissioner for confirmation, or that it was ever confirmed.

Admit that Plaintiff's Ex. "D" is a true copy of the original. Admit the writing and accuracy of Ex. "E" of Plaintiff's Bill; admit likewise of Plaintiff's Ex. "F".

XVI.

The defendants further allege that said alleged grant was never finally confirmed to said Victor Castro or to his successors in interest, if any there be; that the area or boundaries of said tract of land has never been determined or ascertained by survey thereof by the United States Survyor General for California, or has patent thereof issued to any alleged confermee or confermees pursuant to the Act of Congress of July 1, 1864, which said statute was in force on and before March 9, 1928.

XVII.

That by reason of the said decision of the Secretary of the Interior identifying the said premises as swamp, the said State patent to David N. Darlington was confirmed as of the date of its issue pursuant to the provisions of the Act of July 23, 1866, which said confirmation has inured to these accusing defendants.

That by reason of the purchase of said premises by the United States subsequent to September 28,

1850, any title or [87] interest acquired by the grantee thereby has inured to the defendants and their co-tenants in common, and the Plaintiff is estopped to assert the same against the defendants, the same being subordinate to the said S. & O. land grant of September 28, 1850 and to the Federal patent to California therefor.

XVIII.

Reiterating all the foregoing matters, these answering defendants allege as follows:

(a) That the said claim of Victor Castro was not reserved by the treaty of Hidalgo Guadalupe, or by statute of the United States on September 28, 1850.

(b) That the claim of the said Victor Castro was not sub judici on September 28, 1850, or prior thereto, but was subject to dosposition otherwise by the United States on said date and the plaintiff is estopped to deny the validity of its said grant.

(c) That equitable title of California which has inured to these defendants is superior to the alleged title of plaintiff.

(d) That the said patent of the United States to California which by relation, is of the date of September 28, 1850, is superior to the said alleged subsequent decrees of confirmation and superior to said executive orders purporting to reserve said premises for public use of plaintiff, and plaintiff is estopped to deny the validity of the same.

(e) That the area of the premises conveyed to Plaintiff by Bissell ét als, January 4, 1853 was with-

in the boundaries of the survey referred to in said conveyance, to which premises these defendants make no claim, but did not include Island No. 1, or any part thereof, or any part of the areas embraced in State Surveys Nos. 34 and 569, and the line depicted on Ex. "N" (hereto attached and made a part of this answer) as the line of the upland [88] in 1852, was and is the Northern boundary of Mare Island and the Southern boundary of said premises No. 34; that the Northern line of Mare Island, as there depicted, is the Machine Shop depicted on said maps.

XIX.

That Ex. "N" is a copy of the Freeman Survey made for the purposes depicted on its face; that the same is referred to and made a part of this answer to show only the stations marked thereon; that Ex. "M" is a copy of the decision of the U. S. Surveyor General for California relating to the same, and which is referred to and made a part of this answer; that a line drawn from Station 54 to Station 138 constitutes the northern boundary of Mare Island and the southern boundary of the lands embodied in said Survey No. 34, and also constitutes the southern boundary of Island No. 1, and coincides with the parallel intersecting the northern highland of Mare Island as established by the joint actions of the United States and California, culminating in the Act of Cession by California and accepted by the United States May 11, 1854.

XX.

That the plaintiff by its attorney, A. L. Rhodes, appeared in the suit of Bouldin vs. Phelps (30 Fed. 547) in this Court and participated in the trial thereof, and contended that the said Castro grant was void in law and in fact was a forgery, and these defendants claiming under the United States, under its said grant to California, allege the plaintiff is estopped to contend otherwise in this suit.

XXI.

That in the said application of California for certification, Curtis D. Wilbur, Secretary of the Navy, appeared within his authority to so appear, attended by his counsel, the Attorney General of the United States, and disclaimed and abandoned the [89] said executive orders, and these defendants allege that the plaintiff is concluded thereby from asserting now said executive orders, or any claim other than that of its alleged purchase of Mare Island.

XXII.

That the Act of Congress in providing for the acquisition of a Navy Yard at Mare Island made and constituted Caleb Cushing, Attorney General of the United States, a special tribunal to determine whether the swamp and overflowed portions of Mare Island or the swamp and overflowed lands abutting said Mare Island had passed to California under the Swamp and Overflowed land grant of September 28, 1850, and in the exercise of such jurisdiction, he determined that such swamp and overflowed lands

had passed to California, and thereon the plaintiff applied to California for a cession of the overflowed portion of Mare Island, and on May 11, 1854, California granted such application to the extent of ceding to the plaintiff the swamp and overflowed lands on the easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine Shop, and excluding thereby the swamp and overflowed lands north of said parallel running from east to west and from ships channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, which said cession with its conditions was accepted by the plaintiff, and these defendants allege plaintiff is estopped to claim otherwise.

XXIII.

That in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint, (plaintiff's Bill Par. 12) it was determined finally that the premises in controversy, embraced in said State Survey No. 34, were a part of the public domain of the United States on September 28, 1850. [90]

XXIV.

That the supervising authority of the Secretary of the Interior on such matters authorized him to issue such instructions and to take such steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether the lands claimed by California on its said application

for certification, including the premises embraced in said State Survey No. 34, were swamp and overflowed lands on September 28, 1850, and in the exercise of such judgment and discretion he took the steps for such purposes as are detailed in paragraph 12 of this answer, and in which matter the patent by the United States issued to California, and which inured to these defendants, as their interests appear, and in such connection, these answering defendants allege that they deem it unnecessary to plead concerning the legal result of the said peremptory mandamus directing the Secretary of the Interior in the first instance to determine the quality of the land, or in the second instance of directing him to certify said lands to California.

XXV.

Further plaintiff alleges that the decisions and records in the suits of San Francisco Savings Union vs. Irwin (28 Fed. 578) and Bouldin vs. Phelps (30 Fed. 547) are muniments of the title of these defendants and their co-tenants in common, and these defendants plead them for such purpose and for the further purpose of informing the court of the public facts established in each of said suits which these defendants allege are binding and conclusive on the plaintiff herein.

XXVI.

These defendants further plead the Act of Congress approved August 31, 1852, C 109, 10 Stat. 100, 104 Sec. 3, to establish the fact that the Secretary

of the Navy was authorized to seek a cession from California to plaintiff of the lands and juris- [91] diction over the lands described in the Cession Act of May 11, 1854, (or to make or to abandon reservations for public use), and in connection therewith allege that the cession so obtained by the said Secretary of the Navy is binding on plaintiff and that plaintiff is estopped from claiming title to any other swamp and overflowed lands in either of said townships, and these defendants refer to said Cession Act, including the application for such cession, and make the same a part of this answer.

XXVII.

The defendants further plead that the Act of July 23, 1866, an Act to quiet titles to land in California, and a further grant in praesenti of all swamp and overflowed land in California to the State and confirmatory of the Act of September 28, 1850, and further and in such connection with the same, these defendants allege that no part of the premises here was on such date occupied by the plaintiff and/or was devoted to public use and being unreclaimed and not drained, was unfit for any public use and up to the 24th day of July, 1866 the plaintiff had made no improvements or expenditures thereon; that any alleged occupation of said premises was not open, notorious or visible to the human eye; that taxes were levied on said lands and the possessing rights therein by the State of California and paid by the owners thereof, to the State; that Exhibits "A" and

"B" hereto attached, depict all improvements made under the said Act of Congress up to their respective dates of issue (U. S. vs. Romaine 255 Fed. 253) and these defendants allege it is the duty of this court to take judicial cognizance of the facts depicted on the respective exhibits.

XXVIII.

That said Exhibit "A" depicts the topography of Island No. 1, showing the hundreds of tidal streams cutting into it north, south, east and west, including the Salt Marsh lying [92] between it and Mare Island, some 2000 feet in width, which markings are conclusive and binding on the plaintiff.

XXIX.

Reiterating all the foregoing allegations and for a further defense, these defendants allege as follows:

(a) That any portion of Mare Island that was swamp and overflowed on September 28, 1850 was subject to said grant of that date.

(b) That Mare Island lying in the Napa River at its mouth and bounded on three sides by navigable streams, passed to the ownership of California on her admission into the Union of States, and was not subject to reservation for public uses of the United States; that the State of California never consented to the purchase or reservation of any portion of Mare Island except the portion thereof described in said cession Act and limited the same by said cession act to a possessing right for the period that said

Mare Island was occupied by the United States as a Navy Yard and said condition subsequent was accepted by the United States; that Mare Island was not, and is not accessable from any of its sides owing to the S. & O. lands and the tide lands lying between it and navigable waters.

XXX.

That Ex. "Sketch J-2" (Ex. "P") hereto attached and referred to and made a part of this answer, was made and prepared by the United States Coast Survey pursuant to law in the manner and for the purposes depicted on its face and at the time stated on its face, and the northern boundary of Mare Island and the southern boundary of the Swamp and overflowed lands later established by segregation Survey No. 34, and by said examinations made by the Secretary of the Interior, and later by the descriptions inserted in the federal patent to California are depicted thereon and ad interem by other surveys by said Coast and Geolog- [93] ical surveys, and was adopted by the Board of Officers sent to California to select a site for a Navy Yard and is the boundary survey of said area referred to in the said Bissell et als conveyances to the United States, and a copy of which is hereto attached, marked Ex. O and is hereby referred to and made a part of this answer; that the plat of Township 4, N. R. 4 W. etc. Ex. F approved March 9, 1904 was made under directions by the Secretary of the Interior to compile the same from maps on file in the Interior Department and from said State

segregations of S. & O. lands in Napa and Sonoma Counties (the latter now Solano County) the same being State Surveys No. 34 and 569 in accordance with the second clause of R. S. Sec. 2488, and also in accordance with the directions contained in Interior Department letter "E" dated February 2, 1904, which was approved and adopted by said Secretary; that the lands marked in red lines on said township plats is a portion of Island No. 1 and Survey 569, later marked on said plat by the Surveyor and approved by the Secretary of the Interior on the application of California for said certification as above alleged in paragraph 12 of this answer.

That Ex. K hereby referred to and made a part of this answer is the survey of the Board of Officers sent to California to select a site for a Navy Yard and is the survey referred to and made a part of the conveyance of Mare Island, etc. by said Bissell et als., and said survey depicts the natural boundaries of said Island and all of the tract of land so attempted to be conveyed by said grantors; that the land depicted therein as lying on the easterly side of Mare Island is the lands embraced in said Cession Act; that by the terms of sub. (6) of Sec. 2077 of the Code of Civil Procedure of California, said survey is the controlling description of the conveyance and said survey follows the waters edge and the natural boundaries of Mare Island [94] and embraces the entire area of Mare Island and all the lands, in any event, that was granted to said Victor Castro and by him conveyed to alleged predecessors, in title, of

the United States; that the Navy Yard plan attached to said exhibit also shows the area of said Mare Island and depicts the Machine Shop, since erected, and located at Station 138 depicted in Freeman Survey (Ex. N) and pointed out in the decision of the U. S. Surveyor General Wagner (Ex. M) and is the southerly line of said State Survey No. 34, and the same excludes the areas in said State Surveys Nos. 34 and 569.

Reiterating all the foregoing matter and allegations, these defendants allege that said Patent of the United States to California approved the said State Surveys Nos. 34 and 569, and said State Patent to said Darlington and thereby established in California a taxing right, together with police power and the right to exercise eminent domain for the uses of the State, and the State is a necessary and indispensable party defendant in this suit; that on issuance of said federal patent the fee simple title of the United States vested in California as of the date of September 28, 1850, and all subsequent adverse action on part of plaintiff since that date, either by purchase as alleged in the Bill of Complaint herein or by attempted reservation for public uses, was null and void and said federal patent is not subject to collateral attack by the plaintiff in a suit to quiet title under the laws of California, or otherwise, or in an action to cancel its own duly executed surveys or the approved surveys of the state or its own instruments executed in connection with the subject matter of this suit, or its swamp and overflowed reclamation contract, the terms of

which have been fully performed by California and its grantees, all of which was to the knowledge of plaintiff at the time of said performance and at the time of the filing of this suit, and in accordance [95] with its policy to secure the reclamation of said lands by and through the state and its grantees, and all of which was approved by the United States on March 9, 1928.

That all the foregoing allegations and said exhibits are by way of answer and as a cross bill against the United States.

That the Act of September 28, 1850, was not a public land law of the United States, but a contract between the United States and California for the reclamation and/or drainage by the State, and/or its grantees, of all S. & O. lands within the State of California, and is not subject to the Public Land Surveys of the United States in the execution of the same, but subject only to the provisions of said act of July 23, 1866 (R. S. 2488); that no provision of the public land laws, or of the public land surveys of the United States are applicable to the same; that said Sec. R. S. 2488 relates only to S. & O. lands within California.

That the individual interests of said defendants in said premises as tenants in common and entitled to the possession of the same are: James E. O'Donnell 30/100; Walter E. Burke, as trustee, etc. 27/100; Edmund Burke 3/100; and Fletcher M. Slosson, Frances Morse and Eleanor Caroline Whitman 40/100.

WHEREFORE, these defendants pray:

1. That the bill of complaint be dismissed.

2. That the title of these defendants be quieted as against plaintiff, and that these defendants have such other [96] and further decree as may be equitable.

EDMUND BURKE
Pro Se.

WALTER E. BURKE as trustee
Pro Se.

JAS. E. KELBY, (KELBY AND LAWSON),
Attys. for James E. O'Donnell, Fletcher M. Slosson, Frances Morse and Eleanor Caroline Whitman.

State of California,
City and County of San Francisco.

Edmund Burke, being duly sworn, deposes and says, he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters stated to be alleged on information and belief, and as to these matters he believes it to be true.

EDMUND BURKE

Subscribed and sworn to before me this 31st day of March, 1931.

[Seal] O. A. EGGERS
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 31, 1931. [97]

[Title of Court and Cause.]

## MOTION TO DISMISS BILL OF COMPLAINT AS AMENDED.

To the Attorneys for the Plaintiff:

Comes now the defendant Edmund Burke and moves that the Bill of Complaint as amended, be dismissed and a decree be entered in favor of this defendant as prayed for in his amended answer.

EDMUND BURKE
pro se
705 Signal Oil Company Bldg.,
Los Angeles, California.

The said motion will be made on the following grounds:

1. That said Bill of complaint as amended does not state facts sufficient to constitute a cause of action against said defendants, or either of them.

2. That said bill as amended does not state facts cognizable in Equity.

3. That plaintiff has not legal capacity to maintain its suit being without legal or equitable title.

On said motion and in support of said motion, this defendant will use the files herein and the points and authorities in the printed brief in United States vs. Stewart et al heretofore filed in said suit and a copy of which was heretofore filed in said suit and served on attorneys for plaintiff.

Said motion will be brought on for hearing before the Hon. A. F. St. Sure, a judge of this court in the division thereof in which he may be sitting on the 4th day of May 1931, at ten o'clock A. M.,

Post Office Building, San Francisco, California.

EDMUND BURKE

pro se [98]

[Endorsed]: Rec'd. copy this 24th of April, 1931.

GEO. J. HATFIELD

by E. B. CARRIER

Attys. for complainant.

Filed Apr. 24, 1931. [99]

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[Title of Court and Cause.]

## ANSWER TO BILL OF COMPLAINT AS AMENDED.

The undersigned attorneys for the respective parties stipulate as follows:

1. That the name of the defendant Frances Morse be changed to "Frank Clifford Morse",

2. That on line 23, page 3 of said answer the word "are" be inserted between the words "confirmations" and "included".

3. That on line 31, page 3, the figures "1823" be changed to "1923".

4. That on line 13, page 5, the figures "3/100" be stricken out.

5. That on line 9, page 8, the word "that" be stricken out and the word "allege" inserted.

6. That on line 28, page 8, the word "this" be stricken out and the word "its" inserted.

7. That on line 20, page 11 the word "exclusing" be stricken out and the word "excluding" inserted.

8. That on line 25, page 14, the word "court" be stricken out and the word "coast" inserted.

9. That on line 26, page 15, the word "National" be stricken out and the word "natural" inserted.

EDMUND BURKE,
pro se
WALTER E. BURKE,
as trustee, etc., pro se [100]
KELBY and LAWSON,
Attys. for James E. O'Donnell, Fletcher M. Slosson, Eleanor Caroline Whitman and Frank Clifford Morse.
GEO. J. HATFIELD,
by I. M. P.
Attorneys for the United States of America.

It is so ordered.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Apr. 30, 1931. [101]

[Title of Court and Cause.]

## ANSWER OF FRANK R. DEVLIN TO BILL OF COMPLAINT.

Comes now Frank R. Devlin, sued herein as First Doe, Defendant, and answering Bill of Complaint herein, admits, denies and alleges as follows:

Admits that he claims an interest in the lands described in said Bill of Complaint, but alleges and asserts that his said claimed interests in said lands were acquired from and through and are subordinate to, the interests of Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, in and to said lands, and this [102] defendant hereby consents, agrees and stipulates that any judgment which may be rendered herein adverse to interests of his said co-defendants in this paragraph named, shall affect and bind him to the same extent as such judgment may affect or bind his said co-defendants or determine the interests of his said co-defendants in said premises.

That this defendant disclaims any interest in said lands and premises, except as the same exist under the conditions and circumstances set forth herein.

Dated, July 1st, 1931.

FRANK R. DEVLIN,
Pro Per.

[Endorsed]: Service of the within by copy is hereby admitted this 3rd day of July A. D. 1931.

GEO. HATFIELD,
U. S. Atty.
Attorney for Plff.
By E. B. CARRIER,
Special Asst. U. S. Atty.

Filed Jul. 3, 1931. [103]

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[Title of Court and Cause.]

ORDER REVIVING SUIT.

Upon the motion of Geo. J. Hatfield, United States Attorney for the Northern District of California, Attorney for complainant and on the order to show cause heretofore made thereupon by the above entitled court in the above entitled suit, and no sufficient cause appearing or being shown why this order should not be made,

IT IS HEREBY ORDERED that the above entitled suit be and the same is revived and continued against each and all of the following defendants to the above entitled suit: James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Walter E. Burke, as Trustee for Villa M. Behan, Villa M. Behan, formerly Villa M. Burke,

S. J. Simons, V. M. Price, E. J. Sullivan, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in this complaint adverse to complainant's title thereto, and especially against Walter E. Burke, administrator of said Edmund Burke, Deceased, defendant.

Done in open Court this 15th day of February, 1932.

A. F. ST. SURE,
United States District Judge

[Endorsed]: Filed Feb. 15, 1932. [104]

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[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED, that the answer of Edmund Burke on file in this action shall be, and is, the answer of Walter E. Burke, the administrator of the Estate of Edmund Burke, deceased.

Dated: March 4, 1932.

GEO. J. HATFIELD
By. I.M.P.
United States Attorney
WALTER E. BURKE
Solicitor for Administrator.

[Endorsed]: Filed Mar. 4, 1932. [105]

[Title of Court and Cause.]

AMENDMENT TO BILL OF COMPLAINT.

Leave of the Court first had and obtained, plaintiff above named, by Geo. J. Hatfield, Esq., United States Attorney, its attorney and solicitor, files this Amendment to the Bill of Complaint to add thereto a paragraph numbered IV (a).

IV (a).

In July, 1877, the Surveyor General of California, in compliance with the Thirteenth Section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave notice that the same [106] had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to-wit, the Alta California, and one published near the land surveyed, to-wit, the Vallejo Evening Chronicle, published in the City of Vallejo, County of Solano, State of California, and retained in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey, and the said Surveyor General of California approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; thereafter the Commissioner of the General Land Office

approved said survey and plat and caused the same to be filed in a jacket, called the Mare Island Jacket, in the file of military reservations in the General Land Office; thereafter on September 22, 1905 the Commissioner of the General Land Office expressly approved, used and acted on the said survey and plat, and thereafter on September 28, 1905 the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on the said survey and plat.

WHEREFORE, plaintiff prays that the said paragraph numbered IV (a) be deemed added to Plaintiff's Bill of Complaint as an amendment thereto.

(Sgd) GEO. J. HATFIELD
United States Attorney,
Attorney and Solicitor for Plaintiff.

[Endorsed]: Filed May 3, 1932. [107]

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[Title of Court and Cause.]

MOTION OF DEFENDANTS TO EXCLUDE.
MOTION NO. I.

Defendants move the Court to exclude from the evidence plaintiff's "Exhibit E", for the reasons:

(1) That it is incompetent;

(2) That the claim of Castro was never confirmed but that if it was confirmed, it was of Mare Island to the water's edge;

(3) That the conveyance is void insofar as it attempts to convey lands in excess of those confirmed;

(4) That, on September 28, 1850, the alleged grant to Castro was a mere claim, unrecorded, where by law it was required to be recorded;

(5) That it was not sub judici until August 30, 1852;

(6) That the description in the conveyance by Bissell, et al., to the United States, is controlled by reference to the Sloat Survey, which is not attached to the instrument or offered in evidence, or accounted for;

(7) That the conveyance is inoperative in and of itself;

(8) That the claim of Castro remains inchoate and incomplete for that no official survey of the premises has been made to establish the boundaries of the grant, and no patent has isued to the confirmees thereon;

(9) That regarding the grant as validly confirmed, the title of confirmees is only an equitable one and that of plaintiff's is not more, and the conveyance did not vest plaintiff with anything more than the equitable title (and this objection goes to the right [108] of plaintiff, which holds the equitable title to maintain this action); (10) That the Castro grant was found and declared fraudulent and void in the case of Bouldin vs. Phelps, 30 Fed. 547; (11) That the conveyance to plaintiff does not in any event embrace the premises in the controversy; (12) That the title to premises embraced in Survey

No. 34 vested in the State of California by virtue of the Swamp Land Act of September 28, 1850; (13) That the finding and determination of Attorney General Caleb Cushing appointed a special tribunal for that purpose by Act of Congress, that the Swamp and Overflowed portions of Mare Island were excluded from the conveyance of that Island and that such swamp and overflowed portions belonged to California, under the Swamp Land Grant Act, and that, acting upon that decision, plaintiff applied to California for and obtained a cession of swamp and overflowed lands within the exterior boundaries of Mare Island, by reason whereof plaintiff is estopped to claim swamp and overflowed lands within and without the boundaries of Mare Island; (14) That plaintiff is estopped to deny its own patent to California for the land embraced in said survey No. 34, and to impeach the survey upon which it is based; (15) That plaintiff is disabled to impeach the judgment or decree in the Mandamus Case.

MOTION NO. II.

Defendants move to exclude the whole and each and every part of plaintiff's "Exhibit C", composed of

(a) Copy of Transcript of proceedings before Land Commission; (b) Copy of expediente and translation of same used by Land Commission; (c) Order of Reference; (d) Informe and Return of the Justice of the Peace; (e) Certified Copy by the Secretary of the Land Commission of the Grant

of Juan B. Alvarado to Castro, of Mare Island; (f) Decree of Confirmation and opinion of confirmation by Land Commission; (g) Entire record in appeal from Decree of Land Commission in No. 311, on grounds as follows:

(1) Incompetency; (2) Alleged grant was antedated; (3) the [109] alleged grant was spurious and forged; (4) The alleged grant was void on its face for that it failed to show the approval thereof by the Departmental Assembly of California; (5) That it was not registered, as required by the laws and regulations of Mexico, applicable thereto; (6) That the alleged grant was not exemplified, as required by Mexican laws and regulations (7) That it was not subscribed, as required by the laws and regulations of Mexico; (8) That it was beyond the power of Governor Alvarado to make the alleged grant; (9) that no title ever passed to Victor Castro under said alleged grant; (10) That the Land Commission was without jurisdiction to pass upon or decree confirmation; (11) That the alleged decree of confirmation was and is void for lack of jurisdiction; (12) That neither the alleged grant nor a certified copy thereof was ever produced to or filed with said Land Commission or with the District Court of the United States, and the latter was without jurisdiction for the same reasons that the Land Commission was without jurisdiction; (13) That the pretended nunc pro tunc order made by said Court on April 15, 1930, was and is void for the reason stated, and on the further ground that said order was made

and given after the date of the reissuance of the patent of the United States to the State of California, dated March 9, 1928, and which inured to the benefit of these defendants, and was given without notice to or knowledge of defendants; (14) That since the 4th day of January, 1853, Aspinwall and Bissell, grantors of the United States, were no longer interested in the premises; (15) that, in any event, the alleged Castro grant was not sub judici on September 28, 1850, and any valid Mexican Grant on that date fell before the Swamp Land Act of that date, and, so far as the lands embraced in Survey No. 34 were concerned, were excluded, and said acts and proceedings are incompetent and constitute an attempt to attack collaterally the patent of the United States and the survey upon which it is based and to which it responds; and, further, it is an attempted collateral attack on the final judgment or decree [110] in the Mandamus Case, on the final judgment or decree in Bouldin vs. Phelps, 30 Fed. 547, and on the final judgment in San Francisco Savings Union vs. Irwin, 28 Fed. 708, by all and each of which the plaintiff is bound.

MOTION NO. 3.

Defendants move to exclude plaintiff's "Exhibit D" from the evidence, which "Exhibit D" purports to be a certified copy of the Castro Grant, as recorded in the Office of the County Recorder of Sonoma County, California, in Book "H" of Deeds, at page 169, the record of which is in the Spanish language, on the ground that it is incompetent,

the law not then or now permitting the recordation of an instrument in any language other than the English language, and on the further ground that the alleged grant was void for all the reasons stated in Motion No. 2, hereof.

Wieber vs. Corbie, 13 Cal. 166.

MOTION NO. 4.

Defendants move to exclude plaintiff's "Exhibit F", being the report of the Smith Board, on the ground that it is incompetent, irrelevant and immaterial.

MOTION NO. 5.

Defendants move to exclude plaintiff's "Exhibit H", which is a purported copy of a letter from Secretary of the Navy, Kennedy, dated February 12, 1853, on the ground that it is incompetent, irrelevant and immaterial and not tending to support any issue made by the bill and answer; and, on the further ground that the Secretary of the Navy and the President of the United States were without authority to reserve lands, the title to which, under the Swamp Land Act, had passed to the State of California, under the terms of the Act of September 28, 1850.

MOTION NO. 6.

Defendants move to exclude the following exhibits offered by plaintiff, and each of the following exhibits, viz.: [111]

| | | | | | |
|---|---|---|---|---|---|
| Plaintiff's | Exhibit | L-1, | Plaintiff's | Exhibit | L-13-A, |
| " | " | L-2, | " | " | L-15, |
| " | " | L-3, | " | " | L-16, |
| " | " | L-4, | " | " | L-17, |
| " | " | L-5, | " | " | L-18, |
| " | " | L-6, | " | " | L-19, |
| " | " | 2-6-A, | " | " | L-20, |
| " | " | L-7, | " | " | L-21, |
| " | " | L-A, | " | " | L-22, |
| " | " | L-8-A, | " | " | L-23, |
| " | " | L-8-B, | " | " | L-24, |
| " | " | L-9, | " | " | L-25, |
| " | " | L-10, | " | " | L-26, |
| " | " | L-11, | " | " | L-27, |
| " | " | L-12, | " | " | L-28, |
| " | " | L-13, | " | " | L-29, |

on the ground that they are severally incompetent, irrelevant and immaterial, are not, nor is either of them the result of or founded on any survey; that no proper foundation has been laid for their introduction or as to their accuracy, and that neither of them was made by the authority of the United States; there is nothing to show that they, or either of them, were ever adopted or followed by the United States or that they and/or any of them are official; and on the further ground that the only purpose of offering said exhibits is to impeach the description contained in the conveyance from Bissell, et al., to the United States, which description is controlled and determined by the Sloat Survey, being the survey referred to in said Deed of Conveyance; and on the

further ground that the introduction of said exhibits, respectively constitutes an attempt to impeach the patent from the United States to the State of California, inuring to the benefit of defendants; to impeach the decree or judgment in Bouldin vs. Phelps, in San Francisco Savings Union vs. Irwin, and in the Mandamus Case.

MOTION NO. 7.

Defendants move the Court to exclude and strike from the record the following questions and the answers thereto:

Q. I call your attention to the words "Mare Island and Highland of the Island", and ask you what is the significance of that name and the Highland of Mare Island?

A. The name follows local custom. [112]

Q. I direct your attention to the words "Island No. 1 at the North End of Mare Island", and ask you what that indicates?

A. It indicates the local name but does not attempt to define the limits to which that name is to be applied.

Q. Now can you state whether or not this name of "Island No. 1" appeared on any previous map of the Coast and Geodetic Survey?

A. I have examined the records of our Chart Instructions and find that in 1913 a note by the man who made the drawing for the chart of that date, in which he stated that amendments were made in this area, particularly dykes and roads from geo-

graphical survey, quadrangle, and in explanation of the use of those charts, he says that we had only one survey, the Coast Geodetic Survey had only one survey in this area and the geological survey had a recent one made. Among the factors which he applied were roads and dykes and the name of the newly reclaimed area.

Q. Is this the first appearance of that name in any map of the Coast Geodetic Survey?

A. It appeared in a chart which was prepared in 1903.

Q. This is a reprint of the Chart of 1903?

A. This is a reprint of the Chart of 1903.

Q. In the placing of that name, "Island No. 1", on the chart, was that placed there for delimitation purpose or identification purpose?

A. As a name which was applied locally and put on the chart merely for identification.

Q. What became of the name "Island No. 1" to the north end of Mare Island?

A. It was removed from our chart of 1922 on receipt of better information. The name "Island No. 1" had never appeared or "Island No. 2" has never appeared on any of our surveys.

Q. If it did not appear on the survey, will you state what basis, if any, the map maker had to put it on the map?

A. The only thing I can say is the surveyor made an attempt to use [113] local names and from some authority obtained these designations, which he put on the map;

on the ground that it is incompetent, self-serving, hearsay, a conclusion, and not a statement of facts, and not the best evidence.

MOTION NO. 8

Defendants move to exclude and strike from the evidence the following questions and answers:

Q. I want to ask the witness if that was a part of the map in the government archives? Was that made by a map maker?

A. No, I do not believe it was.

Q. Is it any part of the duty of the map maker to make a notation of that kind on the map?

A. Frequently, or once in a while after the plat is approved, there are notations placed on the original plat of the survey.

Q. Directing your attention to the pencil lines on the map, I will ask you if that is a part of the official plat approved by Mr. Beale, of that office, at that time?

A. I do not believe so because it is not customary to put pencil lines on a plat that is for a permanent record, I mean the original plat;

on the ground that the questions and the answers thereto are incompetent, hearsay, self-serving, and calling for the conclusion of the witness.

MOTION NO. 9.

Defendants move to exclude and strike out plaintiff's "Exhibit H", being a copy of a purported letter from the Secretary of the Navy, dated February 9, 1853, requesting the reservation of Mare Island,

and President Fillmore's notation thereon, reserving Mare Island, on the ground that it is incompetent and immaterial, and on the further ground that it was not within the power of the Secretary of the Navy or of President Fillmore to reserve Mare Island, as claimed by the plaintiff in this case, on the ground that [114] Mare Island, or that part of it claimed by the plaintiff, as extending northerly from the upland or fastland of Mare Island proper had been previously granted to the State of California by the Swamp Land Act of September 28, 1850.

MOTION NO. 10.

Defendants move the Court to exclude and strike out from the evidence plaintiff's "Exhibit M", on the ground that it is incompetent and the mere expression of an opinion rendered twenty (20) years after the Sloat Report and Survey was made; that it is hearsay, self-serving, and not binding on the defendants, and is not in correspondence with but is in contradiction of the Sloat Survey and Report.

MOTION NO. 11.

Defendants move the Court to exclude and strike out from the evidence plaintiff's "Exhibit N", on the ground that it is incompetent, irrelevant and immaterial, and does not purport to be official or that it was ever adopted by the United States.

MOTION NO. 12.

Defendants move the Court to exclude and strike from the evidence plaintiff's "Exhibit P", together with the excerpt therefrom, on the ground that it is

incompetent, hearsay, self-serving, the expression, at most, of a mere opinion, and not binding on the defendants.

MOTION NO. 13.

The defendants move to exclude and strike out from the evidence excerpts from the letter of Commissioner Tallman, of the General Land Office, dated September 16, 1914, on the ground that it is incompetent and immaterial, hearsay, self-serving, the expression of an opinion, which opinion was afterwards abandoned by the General Land Office, and on the further ground that it is an attempt to impeach the patent of the United States to the State of California, the surveys on which it is based and the decree or judgment in the [115] Mandamus Case, and the decree or judgment in the case of Bouldin vs. Phelps, and in the case of San Francisco Savings Union vs. Irwin.

MOTION NO. 14.

Defendants move the Court to exclude from the evidence plaintiff's "Exhibit T", being the report of one W. J. Lightfoot, on the ground that it is incompetent, hearsay, self-serving, and in flat contradiction of the Sloat Report and Survey, and an attempt to vary the description contained in the conveyance from Bissell, et al., to the United States.

Respectfully submitted,

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendants.

Dated: May 3-4-5, 1932.

[Endorsed]: Received copy of the within Motions to Exclude this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [116]

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[Title of Court and Cause.]

## MOTION TO DISMISS BILL UNDER RESERVED OBJECTIONS.

Defendants move to dismiss the Bill herein upon grounds and for reasons as follows:

I.

The alleged grant to Castro is void on its face because it purports to grant an interdicted island.

II.

The Bill in connection with the void grant fails to state facts cognizable in equity or sufficient to constitute a cause of action against defendants, or any, or either of them, for that:

(a) The Bill fails to allege that the alleged Grant to Castro was, at the time of its issuance, or at any time, or at all, registered as required by the then existing Mexican law;

(b) The Bill fails to allege that the Castro Grant was approved by the Assembly of the Department of California;

(c) The Bill fails to allege that the claim of

Victor Castro to the ownership of Mare Island was sub judici on September 28, 1850;

(d) The Bill fails to allege that, subsequent to the decrees of confirmation therein referred to, the premises affected thereby were surveyed and/or patented to the alleged confirmees, the alleged successors in interest to Castro;

(e) It appears affirmatively on the face of the Bill that said Claim of Castro, or his successors in interest, to the ownership of Mare Island, did not become sub judici until August 31, 1852, [117] when the petition for confirmation was filed with the United States Land Commission;

(f) The Bill does not allege why Castro, or his successors did not assert claim of private ownership until August 31, 1852, when the petition for confirmation was filed, or that they were in possession of the premises prior to that date.

III.

That the decree of confirmation by the United States Land Commission is void on its face because it purports to confirm a grant void on its face, that is, a grant of an interior island in the Bay of San Francisco.

IV.

That the nunc pro tunc decree of confirmation is void on its face for reason stated in III above.

V.

That the decree of confirmation by the United

States Land Commission became functus officio, since the appeal therefrom was a proceeding de novo.

VI.

That the pretended nunc pro tunc decree is void, for the further reason that it affirmatively appears from the Bill that, prior to its entry, the premises had been patented to the State of California, and, by operation of law, had inured to defendants, as successors in interest to said State.

VII.

That the executive orders, and each executive order, was void and of no effect because issued after September 28, 1850—the date of the approval of the Swamp and Overflowed Land Grant Act.

The second executive order was void for the additional reason that it attempted to reserve for public use "appendages of tule and marsh ordinarily reported to belong to Mare Island". [118]

VIII.

That the conveyance by Bissell, et al., to the United States, of Mare Island, "including tule, lowland or marsh belonging to Mare Island, or ever claimed to belong to Mare Island", is void for the following reasons:

(a) Because it affirmatively appears from the Bill that its base was the void Castro Grant, the void decree of confirmation of the United States Land Commission, and the void nunc pro tunc decree of the District Court;

(b) Because it attempts to convey lands and interests in lands which the grantors in said conveyance did not acquire through said confirmations respectively, and which were in excess of and excluded from the grant as confirmed, of which the grantee was charged with notice;

(c) Because it attempts to convey, by vague and indefinite words, lands other than and outside of and beyond Mare Island, that is, "tule, lowland and marsh belonging to Mare Island, or are claimed to belong to Mare Island", and which are not embraced in said Castro Grant or in said pretended decree of confirmation, but which are included in the S. and O. Land Grant of California, approved September 28, 1850, and embraced in the patent to California, dated March 9, 1928, which patent, by operation of law, has inured to defendants' successors in interest of said patentee;

(d) Because neither the said void grant itself nor any decree pretending to confirm it extended to or embraced lands other than an island in the Bay of San Francisco, California, known as Mare Island, and, being an island, was, and is, bounded by the water's edge.

(e) That said conveyance, which is pleaded as a part of the Bill by reference, makes the survey of Mare Island by the Board of officers sent to California to select a site for a Navy Yard a part of the Bill; which survey was by the Secretary of the Navy, pursuant to an Act of Congress, approved August 31, 1852, by the mandatory di- [119] rection of which said Secretary was directed to acquire a

site for a Navy Yard in the Bay of San Francisco; which survey (area report) excludes the premises in controversy from Mare Island;

(f) Because it appears affirmatively from the Bill, and as a matter of law, that the patent of the United States to California became by relation as of date, September 28, 1850, and hence is superior to the alleged Castro Grant and to any subsequent pretended confirmation thereof, and to any claim of purchase or order of reservation made or issued subsequent to that date;

(g) Because it affirmatively appears that the Castro Grant or the premises embraced thereby were not reserved by the Treaty of Hidalgo Guadalupe, or by the treaty relating to the "Gladsen Purchase", or by any law of the United States prior to March 3, 1851;

(h) That even if the premises in controversy were embraced in the so-called Castro Grant or in the subsequent confirmations, any obligation of the United States to protect the same was only political in character, the United States having the lawful right to disregard the treaty by the passage of the S. and O. Land Grant of September 28, 1850; and if the effect of that act was to violate the treaty, still it is the mandatory duty of this Court to follow the act and to ignore the treaty.

## IX.

That it appears affirmatively from said Bill that the United States claims possession under color of

title, amounting to title by prescription. If the position of the United States is thus accurately stated, does it not follow, as of course, that this suit is based alone on a prescriptive title, through adverse possession. In this view of the case, the Castro Grant, decrees of confirmation, executive orders, and even the deed to the United States, are severally immaterial. But as to the United States, adverse possession [120] with or without color of title will never ripen into a title by prescription until the legal title, (which, in the instant case, it held until March 8, 1928), has gone from it and for a period of five years after that date.

X.

That adverse possession cannot be maintained here since the United States held the legal title to the premises in controversy until the 8th day of March, 1928, when the patent was issued.

XI.

If, as is the case here, the premises in controversy passed to California by force of the S. and O. Land Grant of September 28, 1850,—a matter indubitably determined by the Secretary of the Interior—any title acquired thereto by purchase by the United States inured to California and its grantees, and the United States is estopped from asserting the same against said State or its grantees.

XII.

That the S. and O. Land Grant Act was a contract

between the nation and the State of California, and the United States is estopped to dispute its validity.

XIII.

The United States is estopped to assert the invalidity of its S. and O. Land Grant to California, in order to support the claim of private ownership in a third person, which claim of ownership was subsequently acquired by the United States in hostility to its own grant.

XIV.

That it appears affirmatively from the Bill that the equitable title of the State of California, evidenced by the patent of the State to David N. Darlington, was confirmed by the statutory proceedings instituted by that State and in which the premises known as "34" were identified as those of S. and O. on September 28, 1850, and should be certified as such. [121]

XV.

That the equitable title of the State of California, having been confirmed and perfected by statutory proceedings under Sec. 2488 R. S., it is immaterial whether a patent issued, or, if one issued, whether it is irregular in a matter of description, the Bill not disputing the accuracy or legality of any part of the identification and segratory proceedings; if there was any defect in the survey, the defect was cured by the issuance of the patent to California.

XVI.

Because it appears affirmatively from the Bill that the legal title of the United States has passed to the grantees of the State, defendants herein, this suit is not maintainable since it is the settled law of California that a suit to quiet title cannot be maintained by a plaintiff without the legal title, and it further appears from the Bill that the United States is without legal or equitable title.

XVII.

This suit is essentially one to quiet title, plaintiff claiming under a conveyance to it from Bissell, et al., dated January 4, 1853, and defendants under a patent of the United States, dated March 9, 1928. It results, therefore, that the title of plaintiff at most is only an equitable one while that of defendants is the legal one. This being the case, the plaintiff cannot sue to quiet title against defendants and its only remedy is to compel conveyance of the legal title. Plaintiff does not seek to compel a conveyance of the legal title. On the contrary, its claim is that the patent is void, and it asks this Court to decree it. There is a marked difference between an action to compel a conveyance of the legal title and one in which it is sought to have the legal title declared void and the equitable title transformed into a legal title. [122] In the one case the legal title is recognized, and in the other denied. Clearly, therefore, this suit is a collateral attack not only on the patent of the United States, but also on the patent of the

State of California. Also, it is a collateral attack on the judgment in the Mandamus Case.

XVIII.

Because it appears affirmatively from the Bill that the purported Grant to Castro was of an island, known as "Mare Island", and, being an island, was bounded by the water's edge, and was confirmed to that extent; and anything in excess of that was beyond the power of Castro's successors to grant or convey.

XIX.

That this suit is not one to impeach a patent of the United States on the ground of imposition practiced on an official of the United States, but is one in which the United States seeks to quiet its title as against the defendants on the grounds, (1) that on September 28, 1850, the premises in controversy were held in private ownership by one Castro; (2) that subsequently to September 28, 1850, the premises were reserved for public use; (3) that the description in the United States patent to California is void because the depiction of a subdivisional survey of the premises "(34)" was not made in any plat or any public land survey of the United States, and that plaintiff's "Exhibit J" was the only public land survey and plat of the premises known as "34". This, in face of the fact, that it is not alleged that the survey and plat required by Sec. 2488 R. S. had not been made and approved or that it was inaccurate or insufficient in any detail, and there being

in the Bill no allegation of fraud, imposition or mistake.

XX.

The Bill pleads and sets up the United States patent to California. The patent is made a part of the Bill and the patent itself makes the Mandamus proceedings in the Supreme Court of the District of Columbia a part of the patent, and hence the patent and, equally [123] the Mandamus proceedings, become a part of the Bill. And in and by said Mandamus proceedings it affirmatively appears that it was therein finally determined that the premises, "34", were, (1) a part of the public domain on September 28, 1850; (2) that the Secretary of the Interior, in the exercise of his exclusive jurisdiction, had determined that the premises were swamp and overflowed on September 28, 1850, as contemplated by the S. and O. Act of that date, and, of necessity, that the premises should be certified to California; and hence the averment in the Bill that the lands were unsurveyed and that the description in the patent is void for that reason is a prohibited collateral attack on the final and executive determination of the Secretary of the Interior, which perfected the equitable title of the State, passing to it under the Act of September 28, 1850, and also a like attack on a final judgment of a Court of competent jurisdiction relating to the same subject matter. The judgment went against the Chief Land Officer of the United States and the judgment is binding and conclusive upon the plaintiff. The writ could

not have issued in that case unless the evidence showed or tended to show the existence of the matters and things stated and, among others, that the lands in question had been surveyed and the survey finally approved. See 23 F. (2nd) 137 and 5-6 Page 138-9. The Trial Court found that the Secretary of the Interior found that the lands in question were swamp lands at the date of the Grant, and that such a finding presumes approval of the survey since such approval was a condition precedent to a determination as to the character of the land. To restate, a finding by the Land Office as to quality conclusively presumes a previously approved final survey. And the statement in the patent to the effect that the lands described therein are those unsurveyed, is an idle gesture, as well as a registration of disappointment and, mayhap, a covert attack on the judgment itself, from which the government took no appeal.

Further, and as separate grounds therefor, defendants move the Court to dismiss the Bill and on the further following grounds:

1. That the Bill is multifarious to the extent of being rendered unintelligible, the Bill alleging:

(a) Title thru purchase;

(b) Title thru executive reservations;

(c) Title thru adverse possession under color of title;

making it apparent that each of these allegations is repugnant and hostile to the other.

Plaintiff may only rely upon purchase, if that ground be available to it, and rest his entire case

upon that ground and abandon each of the other grounds.

XXI.

The Bill alleges substantially that the body of land represented by California Survey No. 34 was, on a date in 1841, severed from the public domain of Mexico by virtue of a grant by Mexico to one Castro, and that it never became a part of the public domain of the United States or subject to its control or disposition.

If this is so, the presidential reservations were void and of no effect and constituted an invasion of the rights of Castro and his successors; and if the grant was thus effected, there would be no adverse possession, since the possession was the sale possession of Castro and his grantees, of whom the United States is the final grantee, and the latter could not adverse itself. Moreover, the United States is disabled from setting up adverse possession since, until the issuance of the patent to California, on March 8, 1928, it held the legal title to the land.

2. The Bill presents prohibited collateral attacks, to-wit: as previously in this Motion particularized.

3. That the United States, in this suit, stands in the shoes of its predecessors in interest and can maintain no suit alleging the inability of the United States Patent to California, for the reason that their claim to the premises in controversy continues in-[125] choate, the alleged decrees of confirmation not having been followed by the approved survey and

patent to confirmees, as required by the Act of July 1, 1864 (Stat. 13, Page 332), which statute was in existence on said date and controlled, and controlls the rights of the parties.

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendants.

Dated: May 5, 1932.

[Endorsed]: Received copy of the within Motion to dismiss this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [126]

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[Title of Court and Cause.]

MOTION TO STRIKE.

Defendants now move the Court to strike from the Bill of Complaint the following matters and each of the following matters, that is to say:

I.

To strike from said Bill of Complaint, "Exhibit C," attached thereto and made a part thereof, on the ground that said exhibit in and of itself fails to describe the land thereby attempted to be conveyed, but refers for a description of such land to a source aliunde the exhibit, as appears from the following language contained in said exhibit, to-wit:

"All that tract of land and island called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for a Navy Yard there * * *"

and on the further ground that the said survey referred to, and the map, chart, and field notes thereof are not attached to said exhibit or to said Bill, or proffered, produced, or filed herein, and on the further ground that said "Exhibit C" is meaningless and without value, without said mentioned survey, map, or chart and field notes, for delimiting the land purported to be conveyed.

Sub. 6, Sec. 2077, C. C. P.

II.

To strike from the Bill of Complaint the following, commenc- [127] ing on line 19, and ending in line 24, Page 7, to-wit:

"That ever since September 16, 1853, the United States has occupied the land described in Paragraph II of this Bill, by and thru its Navy Department and Officials, and has used, and improved the same for military purposes in connection with the Naval Station, Navy Yard, and premises of complainant situated thereon."

on the ground that it is immaterial, it not being alleged that the complainant or its grantors or predecessors in the chain of title were in possession of said premises prior to September 28, 1850.

III.

To strike from said Bill of Complaint the following language, commencing in Line 10 and ending in Line 20, Page 11, reading:

> "and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion, or determination of said Hubert Work, as Secretary of the Interior or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officers, or either of them, or of the President of the United States, which said officials are, by law, charged with the duty and responsibility of caring for, protecting, disposing of and awarding patent for or other evidence of title to the public domain and any part thereof;"

on the ground that it is redundant and immaterial, and on the further ground that it is an attempt to impeach and therefore collaterally attack and also to have reviewed, the final judgment or decree rendered by the Supreme Court of the District of Columbia, in the case of the United States of America, ex rel. James E. O'Donnell, relator, against Hubert Work, Secretary of the Interior, respondent, from which judgment or decree respondent afterwards appealed to the Court of Appeals, District of Columbia, where it was affirmed; and which said judgment of affirmance has never been appealed from, reversed, or modified, and is in full force and effect and binding upon the complainant herein.

IV.

To strike from the Bill of Complaint, the following, to-wit: commencing in Line 20 on Page 11 and ending in Line 8 on Page 12, reading: [128]

"and for the further reason that the descriptions in said alleged patent are null and void and designate no tracts or parcels of land shown, or delimited on any approved and accepted United States Public Land Survey Map or Plat;

That the only final, recognized, approved, and accepted United States Public Land Survey, map or plat of that portion of Mare Island contained within fractional Township 3 North, Range 4 West, M. D. B. & M. and showing tracts and parcels of land therein and controlling all description of land and lots and tracts therein for disposal, and other governmental purpose, is the map and township plat approved and accepted in 1923, a true reproduction of which is hereto attached and marked 'Exhibit J,' and referred to and made a part of this Bill of Complaint.

That upon said map and plat are shown no subdivisions, tracts or parcels of land, such as are mentioned in said purported patent of 1928, to the State of California, and no survey '(34)' and no lots, tracts, or subdivisions corresponding to said subdivisional descriptions contained in the purported patent."

on the ground that it is redundant and immaterial; on the further ground that it is an attempt to col-

laterally attack and to have reviewed the final payment in the "Mandamus Case," by stipulation a part of the record here; which judgment is binding upon complainant; and on the further ground that it does not allege that the survey and plat required by Sec. 2488 of the Revised Statutes had not been made and approved, or that the description contained in the patent is inaccurate or insufficient in any detail.

V.

To strike from the Bill of Complaint the map or plat marked "Exhibit J," referred to in and attached to and made a part of said Bill of Complaint, on the ground that the survey referred to in it and which, under subdivision 6 of Section 2077 of the Code of Civil Procedure of California, controls the description, is not attached to the Exhibit, or proffered or produced or filed. In making this motion, movants reserve to themselves the privilege of using said plat, "Exhibit J," should they deem it proper.

VI.

To strike from the Bill of Complaint the language commencing in line 8 and ending in Line 13, of Page 3, reading: [129]

> "A copy of which said grant is hereto annexed, marked 'Exhibit A,' and made a part of this Bill of Complaint. Said instrument was filed for record in the Office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island

being then within and a part of said Sonoma County,"

on the ground that the alleged grant, conclusively presumed to be in the Spanish language, and alleged to have been recorded in Sonoma County on July 28, 1852, was not, and could not have been lawfully recorded in that County or elsewhere in the State of California, there not having been, on said date, nor is there now, any lawful authority for the recordation of any instrument or document in any language other than the English language; and on the further ground that "Exhibit A," of the alleged Castro Grant into English, and is neither the original grant nor a certified copy of it; it being the settled law of California, that a Spanish or Mexican Grant in the Spanish language can only be established by the production of the original or a certified copy. Wilson vs. Cohen, 13 Cal. 166, Bixby vs. Bent, 51 Cal., 390.

VII.

To strike from the Bill of Complaint the language commencing in Line 4 and ending in Line 10, Page 3, reading:

"That, by an instrument dated May 20, 1841, executed by one Juan B. Alvarado, Constitutional Governor of the Department of California, a Grant was duly made by the Government of Mexico to one Victor Castro, of Mare Island, which then included and now embraces the land above described; a copy of which said

grant is hereto annexed, marked 'Exhibit A,' and made a part of this Bill of Complaint."

on the ground that the alleged grant was unsupported by any antecedent Mexican Record or Registry of the Grant; that the antecedent record was the vital evidence of the grant, the grant itself; that said grant could not be presumed; that the antecedent record was the equivalent of actual seizin; that a grant without such antecedent record was no grant, and, further, that there was no approval or evidence of approval of the alleged grant by the Departmental [130] Assembly, a vital necessity under the then existing Mexican Law; and on the further ground that the Governor of California, on May 2, 1841, was powerless to grant an interior island bounded by navigable waters.

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendant.

Dated: May 5, 1932.

[Endorsed]: Received copy of the within Motion to Strike this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [131]

[Title of Court and Cause.]

ORDER.

ORDERED:

1. That the motion of defendants to exclude certain testimony offered by plaintiff filed May 13, 1932, be and the same is hereby denied.

2. That the motion to strike certain parts of the bill, filed May 13, 1932, be and the same is hereby denied.

3. That the motion to dismiss the bill under reserved exceptions, filed May 13, 1932, be and the same is hereby denied.

4. That plaintiff have decree as prayed for in its bill.

Dated: July 31, 1933.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jul. 31, 1933. [132]

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[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action having come on duly and regularly for trial on the Bill of Complaint of the plaintiff as amended, and the answers of the appearing defendants, as hereinafter stated, the plaintiff appearing by Geo. J. Hatfield, United States Attorney, and I. M. Peckham, Assistant United States

Attorney, and Edmund Burke having appeared and answered said Bill of Complaint in his own person and thereafter died, and thereafter the court having duly and regularly made its order reviving this suit against the defendants, including Walter E. Burke, administrator of the estate of Edmund Burke; and defendant Walter E. Burke as trustee for Villa M. Behan, formerly Villa M. Burke, having answered in his own person; and defendant Villa M. Behan, formerly Villa M. Burke, having appeared and disclaimed any right, title or interest except that arising through her said trustee, [133] defendant Walter E. Burke; and defendants James E. O'Donnell and Juanita E. O'Donnell, described herein as Juanita O'Donnell, having answered by their attorneys Messrs. Kelby and Lawson; and defendants Fletcher M. Slosson and Dorothy Slosson, his wife, Frank Clifford Morse and Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, having appeared and answered by Messrs. Athearn, Chandler and Farmer and Frank R. Devlin, their attorneys, for whom said last named attorneys said defendants substituted Messrs. Kelby and Lawson as their attorneys; and defendant Frank R. Devlin having appeared in his own person and consented to be bound by any judgment herein made against the last named defendants through whom said defendant claims; and it being stipulated that the answer of Edmund Burke be deemed the answer of Walter E. Burke as administrator of the estate of

Edmund Burke, deceased; and the defendants S. J. Simons, V. M. Price, E. J. Sullivan, not being found or served, this cause is as to them dismissed; and it appearing that defendants James E. O'Donnell, Fletcher M. Slosson, Frank Clifford Morse, Eleanor Caroline Whitman, Edmund Burke (Walter E. Burke administrator), Walter E. Burke as trustee, answered the Bill of Complaint as amended, but that defendants Juanita E. O'Donnell, Dorothy Slosson, Frances Morse and Alfred Whitman did not answer said complaint as amended, the trial proceeded as upon the original answers of said defendants and the case came on duly and regularly for trial on the 5th day of August, 1931, and was thereafter duly and regularly continued until the 5th day of May, 1932, and evidence both oral and documentary having been introduced and the court having fully considered the same, the court now finds:

I.

That the places of residence of the known defendants are as alleged in paragraph I of the Bill of Complaint.

II.

That complainant, United States of America, is the owner of, and since the year 1853 has occupied as part of the [134] Mare Island Navy Yard Reservation for public, to-wit: Military and Naval purposes, and has been in possession of, the following described land, which is situated in the County of

Solano, State of California and in the Northern Division of the Northern District of California, to-wit:

> "All that parcel and body of land known and designated as tract No. 38, containing 1473.95 acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering fractional Township 3 North, Range 4 West, M. D. B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the defendants claim, within its northerly portion, a strip or lot of ground reported to have been surveyed in the year 1856 on behalf, and under the authority of the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 containing 164.55 acres and designated as a fractional portion of the south one-half of the south-east quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township 3 north, range 4 west, M. D. B. and M."

That said last mentioned land, together with all accretions, natural or artificial, appertaining thereto or to any part thereof, is the specific land and area involved in this suit; that said last mentioned pur-

ported subdivisional descriptions designated as State Swamp and Overflow Survey No. 34 are null and void and that no such tracts or parcels or pieces of land exist or are delineated or shown upon any approved and accepted United States public land survey, map or plat.

III.

That by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Government of Mexico to one Victor Castro of Mare Island which then included and now embraces the land above described; a copy of which said grant is annexed to plaintiff's complaint, Marked Exhibit "A", and re- [135] ferred to and incorporated therein; that said instrument was filed for record in the office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island then being within and a part of said Sonoma County; and George W. P. Bissell and William H. Aspinwall, having succeeded by mesne conveyances to the rights and title of said Victor Castro under said grant, filed in the office of the Board of Land Commissioners, which said Board was empowered to ascertain and settle land claims in the State of California, their petition seeking the confirmation to them of their title to the lands included in said grant to Victor Castro as set out herein, and such proceedings were thereupon had before said Board of Land Commissioners, including the taking of evidence, that a decree was

duly given, made and entered by said Board, confirming to said petitioners, their right and title in and to the lands included in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al. v. United States. In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of said petitioners herein is valid, and it is therefore decreed that their application for a confirmation thereof be allowed.

"The place of the confirmation as hereby given is situate in the Bay of San Francisco and is called 'Isla De La Yegua' or 'Mare Island' and being an island is bounded by the water's edge.

R. Aug Thompson
S. B. Farwell, Commissioner.
George Fisher, Sec'y.

Filed in office May 8, 1855".

IV.

That the said Board of Land Commissioners was vested with power and authority to make such confirmation by the act of Congress approved March 3, 1851, (9 Stats. 631), and pursuant to the terms of Section 8 of which Act, said petitioners, Bissell and Aspinwall, claiming said Mare Island in California under right and title derived from the Mexican Government, did present the same to the said Board of Land Commissioners, together with evidence in

support of said claim and said Board did pass upon the [136] evidence so produced in behalf of the United States, and did determine and uphold the validity of such claim, and within thirty days after such decision did certify the same with the reasons therefor, to the District Attorney of the United States for the District of California, in which such decision was rendered.

That pursuant to the terms of sections 9 and 10 of said Act, the United States, by its District Attorney duly presented its petition to the United States District Court for the District of California, in the District in which said land was situated, praying for a review of said decision and decree of said Board of Land Commissioners, and for a decision on the validity of said claim, and duly complied with the law and requirements governing such petition for review. And the said George W. P. Bissell and William H. Aspinwall filed their Answer thereto, and thereafter such proceedings were had in said matter that on March 2, 1857, the said District Court of the United States for the District of California duly gave and made its order for judgment in said cause, confirming the said grant and the said decision of the said Board of Land Commissioners, and thereafter on April 15, 1930, the District Court of the United States for the Northern District of California, the successor to said Court, duly gave and made its judgment and decree confirming said decision and decree of said Board of Land Commissioners and directing the entry of said decree nunc

pro tunc as of the 2nd day of March, 1857, a copy of which decree is attached to the Bill of Complaint, marked Exhibit "B" and referred to and incorporated therein. Defendants are remote claimants under, successors to, and in privity with, the United States of America, plaintiff and appellant in said appeal from the decision of said Board of Land Commissioners, against which plaintiff and appellant said judgment and decree was entered with respect to sovereign and paramount title then and there asserted and claimed by the said claimant and appellant, and defendants are bound by said claim and decree. [137]

IV(a)

In July, 1877, the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California", approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to

said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on said survey and plat.

V.

That the United States of America acquired the title and interest of George W. P. Bissell and William H. Aspinwall in and to the land so conveyed and confirmed to them, and also the title and interest of Mary S. MacArthur in said land as a tenant [138] in common of the said Bissell and the said Aspinwall, by purchase for a valuable consideration, namely: $83,491.00, and received a deed of conveyance of said property executed January 4, 1853, a copy of which is annexed to plaintiff's complaint and marked Exhibit "C", and referred to and incorporated therein; and the said deed was duly filed for record and recorded in the Recorder's

Office of Solano County, California, on April 18, 1853, said Solano County being the County in which said lands were situated.

VI.

That on November 6, 1850, the President of the United States by Executive Order reserved to the United States for military and naval purposes from entry by private persons, among others, the following tract of land on San Francisco Bay, to wit:

Mare Island.

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of section 3 of the Act of August 31, 1852, (10 Stats. 104), duly selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island, and the harbors, waters and anchorages connected therewith, and necessary to the use of the same and within which is included the lands and premises described in paragraph II of the Bill of Complaint herein, as a site for a Navy Yard and Naval Depot provided for by said Act of Congress.

Following said selection the Secretary of the Navy on February 9, 1853, recommended to the President of the United States that said lands and premises be reserved for public use, and on February 11, 1853,

President Millard Fillmore duly approved [139] said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his order making such reservation is attached to the Bill of Complaint marked Exhibit "D" and referred to and incorporated therein.

From time to time Congress of the United States of America duly approved, ratified and confirmed said reservation and by various statutes appropriated large sums to improve the lands comprised therein and authorized their improvement.

VIII.

The lands and premises described in paragraph II of Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California, under the rule and occupancy of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court as aforesaid, to George W. P. Bissell and William H. Aspinwall, and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

That ever since September 16, 1853, the United States has occupied the lands described in paragraph II of the Bill of Complaint by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval Station, Navy Yard and premises of complainant situated thereon.

The possession of the United States of America thereof has at all times been actual, open, adverse and exclusive [140] and under claim of right and absolute ownership in fee of said land, and under the title and color and claim of title supplied by said reservations and the said ded of January 4, 1853, the said decision of the said Board of Land Commissioners of May 8, 1853, the said order of the said District Court of the United States for the District of California duly given and made March 2, 1857, and said decree of April 15, 1930. The lands described as claimed by the defendants in paragraph II of plaintiff's Bill, during such period of occupancy of the complainant, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by the complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located on the northerly portion of said land described in paragraph II of plaintiff's Bill of Complaint, a Marine Corps Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a

causeway to the Navy Yard, an overseas freight shipment transit shed, Navy Yard scrap bins and storage, an electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000.00 and were and are used by the complainant for the operation and activities of its naval and military force.

IX.

The lands in question described in paragraph II of plaintiff's Bill of Complaint were claimed by the State of California under and by virtue of the Act of September 28, 1850, (9 Stats. 519), commonly known as the "Swamp Land Act," by which the whole of those Swamp and Overflowed Lands, made thereby unfit for cultivation, comprising part of the public domain of the United States of America on the date of the passage and approval of said Act, and remaining unsold, were granted to the State. Said lands were purportedly surveyed in the year 1856 under authority of the State of California, and identified by such survey as [141] Survey No. 34 and as containing 164.55 acres in area, and thereafter the State of California issued its patent purporting to convey said lands included in said survey to David M. Darlington, under date of March 18, 1857, a copy of which patent is annexed to plaintiff's Bill of Complaint and marked Exhibit "E", and referred to and incorporated therein.

X.

Defendants herein named, and each of them, claim title or some right, title or interest, in and to the lands described in said purported Survey No. 34 and in paragraph II of the plaintiff's Bill of Complaint, through and by virtue of Mesne conveyances vesting in them the purported title of the said David M. Darlington, or some part or parcel thereof. Defendants and each of them claim some right, title or interest in said real property adversely to the right and title of plaintiff, but each of said claims is wholly without right or foundation in law or fact; that there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of plaintiff's Bill of Complaint adverse to the complainant's ownership, which claims cast a cloud upon the complainant's title therein; that the claims of said persons are wholly without right or merit in law or in fact.

The nature of defendants' claims appears by their said answers but said claims are wholly without right.

XI.

On March 9, 1928, a purported patent was issued to the State of California, which alleged patent is in effect an attempted conveyance of the lands, secondly and lastly mentioned and described in paragraph II of plaintiff's Bill of Complaint, a copy of which said purported patent is annexed to plaintiff's Complaint and marked Exhibit "F" and referred

to and incorporated therein. That said purported patent was issued under and pursuant to an order dated March 8, 1928, by the then Secretary of the Interior, directing that a patent issue to the State of California in accordance with a preemptory Writ of Mandamus [142] issued on March 6, 1928, out of the Supreme Court in the District of Columbia in an action at law therein, namely No. 70,226, entitled, "The United States of America, ex rel James E. O'Donnell, relator, vs. Hubert Work, Secretary of the Interior, Respondent," a copy of which said order is attached to plaintiff's Complaint and marked Exhibit "G" and is referred to and made a part of plaintiff's Bill of Complaint, and a copy of which said writ is attached to plaintiff's Complaint and marked Exhibit "H" and referred to and made a part of said Bill of Complaint. Thereafter the Secretary of the Interior made and filed his return to said Writ of Preemptory Mandamus, a copy of which return is annexed to plaintiff's Complaint and marked Exhibit "I" and is referred to and incorporated therein. But the said alleged patent to the State of California is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act, and were not a part and never had been a part of the public domain of the United States or been opened for entry by private persons, or subject to the aforesaid Swamp Land grant, but

have at all times since the date of said Mexican grant to Victor Castro been owned and occupied by complainant as proprietor and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that the said land had been selected for and devoted to the necessary public purposes of the United States and withdrawn from entry by private persons as alleged in paragraphs VI and VII of plaintiff's Bill of Complaint, long prior to the issuance of the said purported patent to the State of California, and while the legal title in and to said lands was vested in the United States of America; and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion, determination or power of said Hubert Work, as Secretary of the Interior, or of the Commissioner of the General Land Office, [143] or upon or pursuant to any finding or conclusion or judgment of said officers or either of them or of the President of the United States, which officials are by law charged with the responsibility of caring for, protecting, disposing of and awarding patents for, or other evidences of title to, the public domain and any part thereof; and for the further reason that the descriptions of said alleged patent are null and void and designate no tracts or parcels of land shown or delineated on any approved and accepted map or plat.

That the only final, recognized, approved and accepted United States public land survey, map or plat of that portion of Mare Island contained within fractional township 3 North, Range 4 West,

M. D. B. and M., and showing tracts and parcels of land therein and controlling all desrriptions of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and accepted in 1923, a true reproduction of which is attached to plaintiff's Bill of Complaint and marked Exhibit "J" and referred to and incorporated therein.

Upon said map and plat are shown no subdivisions, tracts or parcels of land such as are mentioned in said purported patent of 1928 to the State of California, and no survey No. 34 and no lots, tracts or subdivisions corresponding to said subdivisional descriptions are contained in the purported patent.

XII.

That the true name of defendant sued herein as First Doe is Frank R. Devlin, who has appeared and answered; that the true names of defendants as Second to Tenth Doe inclusive, and the interest claimed by them respectively to the lands described in paragraph II of complainant's Bill of Complaint are unknown to plaintiff and to the court and said defendants Second to Tenth Doe, inclusive, are hereby dismissed.

XIII.

Complainant is without adequate remedy in the premises at law. [144]

XIV.

It is not true that defendants or any of them are owners of, or entitled to the possession as tenants in

common, or otherwise as alleged in the joint answer of defendants to the Complaint as Amended, or any part of the tract described in paragraph II of plaintiff's Complaint or in California State Swamp and Overflow Survey No. 34.

XV.

It is not true that the grant of Mare Island by Juan B. Alvarado to Victor Castro dated May 20, 1841, is void on its face or at all because it purports to grant an interdicted island or otherwise, or that the said grant was or is a forgery, or that plaintiff knew it was such when plaintiff's Bill of Complaint was filed.

It is not true that said decree of confirmation by the United States Land Commission is void on its face.

XVI.

It is not true that the proceeding to confirm the said grant of Mare Island to said Castro and his mesne successors had terminated on June 4, 1853, by their conveyance of said premises to plaintiff or plaintiff's acceptance of the same, and it is true that the said granted premises included Mare Island to the water's edge, but it is not true that it did not include any portion of the premises sought to be described, delineated and depicted in State Segregation Surveys Nos. 34 or 569, or either of them, or any land north of a line drawn from Station 54 to Station 138 as depicted in Freeman's survey of 1877.

It is not true that the appeal of the United States from said decree of confirmation was, or that any of the proceedings thereafter had therein were null and void on its or their face, or otherwise.

It is not true that the nunc pro tunc decree of confirmation entered in this court therein is null and void on its face or otherwise. [145]

XVII.

It is not true that the conveyance of Bissell, Aspinwall and McArthur to the United States, dated June 4, 1853, is null or void on its face or otherwise.

XVIII.

It is not true that the order of the President, dated November 6, 1850, reserving Mare Island for public use is null or void on its face or otherwise.

XIX.

It is not true that the order of the President, dated February 9, 1853, reserving Mare Island with all its appendages of tule or marsh ordinarily reported to belong to Mare Island is null or void on its face or otherwise.

XX.

It is not true that the premises described in paragraph II of plaintiff's Complaint are a part of any Island No. 1 embraced in said Surveys Nos. 34 or 569 as depicted on the official maps of plaintiff, copies of which, marked respectively "A" and "B" are attached to the joint answer of defendants filed March 31, 1931, and therein referred to and incor-

porated, or as reported or depicted in any approved survey and plat of Township 4 North, Range 4 West, M. D. B. & M., accepted November 8, 1923, were on September 28, 1850, or at any time or at all, or ever, a part of the public domain of the United States, or swamp and overflowed lands embraced in Swamp and Overflowed Land Grant to California at that date.

It is not true that said premises or any part thereof were not within the exterior boundaries of Mare Island or were north of the northern boundary of Mare Island as established officially by United States Surveyor General Wagner, or anyone, within his jurisdiction to so establish; that Exhibit "M" attached to and made a part of said answer of March 31, 1931, was neither a decision, nor within the jurisdiction, of United States Surveyor General Wagner; that Surveyor General Wagner had no power to alter or modify said survey of Freeman. [146]

XXI.

It is not true that the improvements made by plaintiff on the premises in controversy were made as a trespassal upon said premises or were without claim or right or color of title, although the same were made without and against the consent and adversely to the claims of defendants and their predecessors in title; that it is not true that plaintiff is without right or equity in the premises or is proceeding or ever did proceed as a trespasser or by force of arms.

XXII.

It is not true that statements in the patent to the State of California that the lands therein described were unsurveyed at the date of the issue said patent is untrue, or was and is an error of law which is refuted by any record on which said patent is based.

XXIII.

It is not true that defendants have any interest in the premises sued for as tenants in common with others as the record discloses or otherwise, or that as such co-tenants they are entitled to the possession of said premises under any mesne conveyance from the State of California as successors of plaintiff, or otherwise, extending to defendants under the Swamp and Overflowed Land Grant to California of September 28, 1850, or under any other grant.

XXIV.

It is not true that the patent of the United States, with its recitals or descriptions, or otherwise, issued to California, March 9, 1928, determined the land was part of the public domain on September 28, 1850, or was not included in the grant to Castro.

It is not true that the lands described in State Surveys Nos. 34 and 569 were included in Swamp Land Grant of September 28, 1850.

It is true that about September 16, 1914, California applied to the Commissioner of the General Land Office for certi- [147] fication to it of lands falsely claimed by it to be indefinitely represented as swamp and overflowed on certain plats approved

March 4, 1863, pursuant to R. S. Sec. 2488; that lines on said plats claimed to refer to the lands in controversy were not surveyed lines but were merely drawn in. But the application was correctly rejected by the Commissioner of the General Land Office on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in R. S. Sec. 2488, or "furnish information indicating that any particular part, great or less, of the lands claimed were wet and unfit for cultivation." That thereafter, about February 15, 1915, the said Commissioner, pursuant to R. S. 2488, paragraph 5, and particularly pursuant to a Writ of Mandamus of the District of Columbia Supreme Court, approved instructions for the examination and investigation by the United States Surveyor General for California of the lands on Mare Island claimed by California as swamp and overflowed lands, and to identify the location and character of the lands embraced in State Swamp and Overflow Surveys Nos. 34 and 569, which lands were claimed by California as swamp and overflowed lands under said application.

It is true that thereafter and pursuant to said instructions said examination was made by the United States Surveyor General and that later he reported to the Secretary of the Interior that said lands embraced in said State surveys were in physical character "swampy and overflowed", and thereupon the Secretary of the Interior determined that said lands were swamp and overflowed and should

be certified to the State of California under its application in the absence of sufficient reasons to the contrary. That said premises No. 34 were in said order recited to be "contiguous" to Mare Island though not recited to be apart from it, and the said action of said Secretary was declared by the District of Columbia Supreme Court to be an approval of the [148] plat of Township 4 North, Range 4 West, and thereafter, pursuant to further Writ of Mandate of the District of Columbia Supreme Court the land embraced in said State surveys were listed and patented to the State of California.

XXV.

It is true that Exhibit "A" attached to defendants' Answer is a Coast Survey Chart, and Exhibit "B" attached to said Answer a Geological Survey Chart, and Exhibit "H" attached to said Answer an alleged township plat of 4 North, Range 4 West, M. D. B. & M., and that each of said Exhibits labels the northern or fan portion of Mare Island as "Island No. 1", but do not depict them as separate tracts of land or separate islands but all within a continuous mean high water line including both "Island No. 1" so called, and the lands here in controversy, State Swamp and Overflowed Survey No. 34 so called; and that "Island No. 1" as set forth on said charts is a local place name of recent application; and that the lands in controversy here would fall partly on "Island No. 1" as designated on said charts; that each of said charts depicts Island No. 1 and Mare Island as separate tracts of firm land,

though not as separate islands; that said plats, maps and surveys are official acts of plaintiff, duly authorized by law, and said Exhibit "H" was approved by the Secretary of the Interior. It is also true that it was no part of the duties or powers of the persons making said maps to impose local place names on said maps in such manner to prejudice the rights of the United States.

XXVI.

It is not true that the imposing on Exhibit "E" annexed to defendants' Answer of the delimitation of the premises purported to have been reserved for public use by the said presidential orders by the Secretary of the Interior was a null or void act or that either of said orders was void on its face or without legal effect, though said act of the Secretary of the Interior could not limit the rights of the United States to lands outside [149] the area so delimited. It is not true that at the time of the making of said orders the equitable title to the premises in controversy had passed under any grant in praesenti or otherwise to the State of California under Swamp and Overflowed Land Grant of September 28, 1850, or any other grant, nor was said grant a contract between the United States and California which inured to the answering defendants and/or their co-defendants as their interest might appear, nor was the President of the United States without authority in law to make either of said executive orders.

It is not true that Exhibit "A" annexed to plaintiff's Bill of Complaint is not a copy of the grant to Castro, nor was said purported grant a forgery.

XXVII.

It is not true that said alleged grant was never finally confirmed to said Victor Castro or to his successors in interest. It is not true that the area or boundaries of said tract of land has never been determined or ascertained by survey thereof by the United States Surveyor General for California. It was surveyed by Freeman and the Freeman Survey was approved. It is true no patent thereof has issued to the confirmee or confirmees pursuant to the Act of Congress of July 1, 1864, or otherwise, but the court finds such patent unnecessary, as simply a confirmation by the United States to the United States, the transferee of the confirmees.

XXVIII.

It is not true that by reason of said decision by the Secretary of the Interior identifying, or attempting to identify, the premises sued for, or any other premises, as swamp, the said patent of David M. Darlington was confirmed as of the date of its issue pursuant to the provisions of the Act of July 23, 1866, or any Act, or that said confirmation has inured to any of the appearing defendants. [150]

It is not true that by reason of the purchase of said premises by the United States subsequent to September 28, 1850, any title or interest acquired by the United States thereby has inured to any of the defendants or their co-tenants in common or

otherwise, or that plaintiff is estopped to assert the same against the defendants or any of them, or that the same was or is subordinate in any particular to State-Swamp and Overflowed Grant of September 28, 1850, or to any Federal patent to California therefor.

XXIX.

It is not true that said claim of Victor Castro was not reserved by the Treaty of Guadalupe Hidalgo, or by statute of the United States on September 28, 1850. It is not true that the claim of said Victor Castro was not sub judice on September 28, 1850, or prior thereto, or was subject to disposition otherwise by the United States on said date or that the plaintiff is estopped to deny the validity of its said grant.

It is not true that equitable title of California or any equitable title of these defendants, or any of them, is superior to the title of plaintiff.

XXX.

It is not true that the patent of the United States to California, by relation or otherwise, is of the date of September 28, 1850, or is superior to the decrees of confirmation, or superior to said Executive Orders purporting to reserve said premises for public uses of plaintiff, or that plaintiff is estopped to deny the validity of same.

It is true that the area of the premises conveyed to plaintiff by Bissell, Aspinwall and McArthur, January 4, 1853, was within the boundaries of the

survey referred to in said conveyance and that said survey did include Island No. 1, so-called, as delineated on said charts, and the whole thereof, and included all parts of areas embraced in said Swamp and Overflow Survey [151] No. 34 and some of the area embraced in said Swamp and Overflow Survey No. 569. It is not true that the line depicted on Exhibit "N" as the line of the upland in 1852 was or is the northern boundary of Mare Island or the southern boundary of said premises embraced or claimed to be embraced in said Swamp and Overflow Survey No. 34, or that the northern line of Mare Island as there depicted is the Machine Shop depicted on said maps; that Exhibit "M" is not a copy of any decision of the United States Surveyor General for California relating to the Freeman Survey; but the Freeman Survey was a closed transaction and was finally approved at the time Exhibit "M" was written. (Note for Judge St. Sure: By Exhibit M Defendants' Exhibit 10 for Identification, plaintiff's Exhibit in Evidence No. Z-3 (The Wagner letter of August 7, 1879) is probably intended.)

It is not true that a line drawn from Station 54 to Station 138 on the Freeman Survey constitutes the northern boundary of Mare Island or the southern boundary of any lands embodied or claimed to be embodied in said Survey No. 34, or the southern boundary of any Island No. 1, there being no such island as distinct from Mare Island.

XXXI.

It is not true that plaintiff is estopped to contend in this suit that the said Castro grant was void in law and not in fact a forgery.

XXXII.

It is not true that in the said application of California for certification, Honorable Curtis D. Wilbur, Secretary of the Navy, disclaimed or abandoned the said Executive Orders of President Fillmore reserving Mare Island, or that plaintiff is concluded in any wise from asserting now said Executive Orders, or any claim other than that of its alleged purchase of Mare Island.

XXXIII.

It is not true that the Act of Congress providing for the acquisition of a Navy Yard at Mare Island made or constituted [152] Caleb Cushing, Attorney General of the United States, a special or any tribunal to determine whether the swamp and overflowed portions of Mare Island, or the swamp and overflowed lands abutting said Mare Island had passed to California under the Swamp and Overflowed Land Grant of September 28, 1850, or that any exercise of any such jurisdiction determined that such swamp and overflowed lands had passed to California, or that thereupon the plaintiff applied to California for a cession of the overflowed portion of Mare Island, or that on May 11, 1854, California granted any such application to the extent of ceding to plaintiff the swamp and overflowed lands on the

easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine Shop, and excluded thereby the said lands north of said line running east and west and from ships channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, or that any such restriction, with its conditions, was accepted by the plaintiff, nor is plaintiff estopped to claim otherwise.

XXXIV.

It is not true that in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint it was determined finally that the premises in controversy embraced in Swamp and Overflow Survey No. 34, were part of the public domain of the United States on September 28, 1850.

XXXV.

It is not true that the supervising authority of the Secretary of the Interior over public lands of the United States authorized him to issue any instructions or to take any steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether any of the lands in controversy claimed by California on its said application for certification, including the premises embraced in said Swamp and Overflow Survey No. 34 were swamp and overflowed lands [153] on September 28, 1850, or that in the exercise of his lawful judgment and discretion he took the steps for such purpose as are detailed in paragraph

XII of the Answer filed March 31, 1931. Save for the powers given the Interior Department by the Land Commission Act as Amended, the lands in controversy have been under the exclusive jurisdiction of the Navy Department.

XXXVI.

It is not true that the decisions and records in the suits of San Francisco Savings Union v. Irwin, or Bouldin v. Phelps, are muniments of the title of these defendants or their co-tenants in title, or otherwise, in any controversy between any of said defendants or said co-tenants and the United States. None of the facts established in any of said suits are binding or conclusive on plaintiff herein.

XXXVII.

It is not true that the Cession Act of the State of California of May 11, 1854, is binding on plaintiff as a restriction on plaintiff's claim to any part of the lands granted, held or claimed by Victor Castro and his successors in interest, or any of them conveyed to the United States, nor is claimant estopped from claiming title to the lands here in controversy or any swamp and overflowed lands in either of said townships or any other township falling on Mare Island as granted, conveyed and confirmed as above set forth.

XXXVIII.

It is not true that no part of the premises in controversy was on July 23, 1866, occupied by plaintiff or devoted to public use or was unfit for any

public use, or that up to July 24, 1866, plaintiff had made no substantial improvements or expenditures thereon. It is not true that any alleged occupation of said premises was not open, notorious and visible to the human eye. It is true that one tax was levied upon said lands by the State of California and was paid by present defendants to the [154] State subsequent to the filing of this suit.

XXXIX.

Exhibit "A" attached to defendants' answer is a Coast and Geodetic Survey in accord with the Freeman Survey and binding on plaintiff only so far as it shows the configuration of the coast, and the meanders of the mean high tide line which is the same as the Freeman Survey.

XL.

It is not true that any portion of Mare Island was swamp and overflowed land or public domain of the United States on September 28, 1850, or was subject to the Swamp and Overflowed Grant on said date.

It is not true that Mare Island passed to the ownership of California on her admission into the Union or was not subject to reservation for public use of the United States. It is immaterial that the State of California never consented to the purchase or reservation of any portion of Mare Island except the portion thereof described in said Cession Act, or was competent to limit, or in fact limited, by said Cession Act, to a possession right for the period when Mare Island was occupied by the United States

Navy as a Navy Yard or that any conditions subsequent were accepted by the United States, or that Mare Island was not and is not accessible from any of its sides owing to the swamp and overflowed lands or the tide lands lying between it and navigable waters.

XLI.

That Exhibit "P" referred to and incorporated in said Answer filed March 31, 1931, was made and prepared by the United States Coast and Geodetic Survey pursuant to law in the manner and for the purposes depicted on its face to the extent authorized by Federal statutes and at the time stated on its face; but it is not true that any northern boundary of Mare Island or southern boundary of swamp and overflowed lands later established by State Segregation Swamp and Overflow Survey No. 34 [155] or by any examinations made by the Secretary of the Interior, or by any descriptions inserted in the Federal Patent to California, are depicted thereon or on any other surveys by said Coast and Geological Surveys of the United States, or was adopted by the Board of Officers sent to California to select a site for a Navy Yard or is a boundary survey of said area referred to in said Bissel conveyance, so-called to the United States. It is true that the plat of Township 4 N., R. 4 W., approved March 9, 1904 (Exhibit "F") was made under directions by the Secretary of the Interior to compile the same from maps on file in the Interior Department and from State segregations of swamp and overflowed lands in Napa and Sonoma Counties (the

latter now Solano County), the same being State Swamp and Overflow Surveys Nos. 34 and 569, purportedly pursuant to the second clause of R. S. Sec. 2488, and also in accordance with directions contained in Interior Department letter "E" dated February 2, 1904. It is not true that the lands marked in red lines on said township plats are any part of any Island No. 1 but they are part of the lands covered by Swamp and Overflow Survey No. 569, all marked on said plat by the Surveyor, but not approved by the Secretary of the Interior, on the application of California for certification as alleged in paragraph 12 of said answer of March 31, 1931. It is not true that Exhibit "K" referred to and incorporated in said Answer (or plaintiff's Exhibit "L-16" in Evidence), is the survey of the Board of Officers sent to California to select a site for a Navy Yard nor is the only part conveyed and made part of said Mare Island by Bissell, Aspinwall and McArthur. That said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island. The survey referred to in said conveyance and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay. It is not true that Exhibit "K" (the Cutt's detailed drawing, so-called) [156] is the controlling description of the conveyance from Bissell and Aspinwall to the United States nor that said survey follows the water's edge or the natural boundaries of Mare

Island throughout their entire extent or embraces the entire area of Mare Island or all of the lands that were granted to Victor Castro and by him conveyed to the predecessor in title to the United States. It is not true that the Navy Yard plan attached to said exhibit also shows the area of Mare Island or the southerly line of said Survey No. 34, nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

XLII.

It is not true that the patent of the United States to California approved said State Surveys Nos. 34 and 569 or said State patent to said Darlington or thereby established in California a taxing right, together with police power or the right to exercise eminent domain for the uses of the State, nor is the State a necessary or indispensable party to this suit; nor on issuance of said Federal patent did the fee simple title of the United States vest in California as of the date of September 28, 1850, and it is not true that all or any subsequent adverse action on the part of the plaintiff since that date, by purchase as alleged in the Bill of Complaint, or by reservation for public use, were null and void; and said Federal patent is subject to collateral attack by plaintiff in a suit to quiet title under the laws of California, and of the United States, and in an action to cancel surveys by its own land officers and the approved surveys of the State and its own patent executed in connection with the subject matter of this suit, and the alleged claim of Swamp

and Overflowed Grant; that nothing done on March 9, 1928, by the United States or any of its officers approved or in any wise validated any of the acts done or performed by California and its grantees or in respect to the lands in controversy. [157]

XLIII.

It is not true that James E. O'Donnell is owner in title, or otherwise, with the co-defendants, of 30/100 or any interest, or otherwise; it is not true that Walter E. Burke, as trustee, etc., or otherwise, is entitled as tenant in common, or otherwise, to 27/100, or any interest, undivided or otherwise; it is not true that the estate of Edmund Burke is entitled to the possession of an interest in common, or otherwise, of 3/100 or any interest, undivided or otherwise; none of the defendants Fletcher M. Slosson, Frances Morse, Eleanor Caroline Whitman, are entitled to 40/100 undivided interest, or any interest, in common or otherwise; none of the defendants are entitled to any interest in common, or otherwise, in the premises in controversy.

XLIV.

The answer of Walter E. Burke as trustee for Villa M. Behan, filed January 9, 1931; the answer of defendant Edmund Burke, filed January 9, 1931; the answer of James E. O'Donnell, and Juanita O'Donnell, filed January 16, 1931, and the answer of Fletcher M. Slosson, Dorothy Slosson, Frank Clifford Morse, Frances Morse, and Eleanor Caroline Whitman and Alfred Whitman filed January 26, 1931, are in all respects identical.

XLV.

It is not true that the patent of the United States to California issued March 9, 1928, was duly issued in the absence of fraud, imposition, and/or mistake, but it is true that said patent was issued under a mistake as to the power of the Land Office and a mistaken supposition that the land in controversy was public domain of the United States on September 28, 1850. It is not true that the patent conveyed the legal title thereto to the State of California, or is any evidence thereof as of the date of September 28, 1850. It is not true that any subdivisional survey of said lands was made by authority of the United States in the provisions of the Act of July 26, 1866, or that any survey of the lands returned any of the premises in controversy as swamp [158] and overflowed lands on September 28, 1850; or that amongst any of the lands so returned were any premises described in State Swamp and Overflow Survey No. 34; nor was any description approved or adopted by the United States or carried into its patent to the State of California as its terms of description. Further, it is not true that any accretions, natural or artificial, appertaining or accruing to the premises included in Swamp and Overflow Survey No. 34 have become a part thereof nor that plaintiff has no right, title or interest therein, nor to any part thereof beyond or north of the line or parallel intersecting the northerly highland of Mare Island; whose northerly boundary is not the line of the upland, so-called, of Mare Island existing in 1852, shown on defendants' Exhibit "B", referred to and incorpo-

rated in said Answers, nor was said line the line established by the survey referred to by plaintiff's Exhibit "C"; nor was plaintiff at the time this action was filed, nor is it now, in possession of said survey. The survey and plat referred to in plaintiff's Exhibit "C" was the plat of Mare Island as inscribed on a chart of San Francisco Bay by Cadwallader Ringgold, was used by Secretary Kennedy in making his selection of a site for a Navy Yard; by President Fillmore in reserving the same; and was thereafter duly recorded in the office of the United States Surveyor General for California, where it was apparently destroyed in the San Francisco fire of 1906.

XLVI.

It is not true that the grant by Juan B. Alvarado to Victor Castro did not embrace the premises described in Swamp and Overflow Survey No. 34. It is true that the nunc pro tunc final confirmation of the claim of Bissell and Aspinwall was not followed by an official survey or patent as specified by the Act of March 2, 1851, and its Amendments, before the issue of the Federal patent to California, and in this connection the court finds that in 1877, pursuant to authority given him by law, the Surveyor General for California caused the land confirmed in the [159] Bissell and Aspinwall confirmation to be surveyed by Freeman, and thereafter approved said survey; that said survey was thereafter duly approved by the Commissioner of the General Land Office, as hereinabove stated, and said approved

survey was in all respects validated by said final decree of confirmation. It is not true that the claim of Victor Castro was inferior or subordinate in legal character to the Swamp and Overflowed Land Grant of September 28, 1850, or to the Federal patent to the same by the plaintiff to California, nor did said patent by relation become effective as of the date of September 28, 1850.

XLVII.

It is not true that the conveyance referred to in paragraph V of plaintiff's Bill of Complaint did not embrace the lands described in State Swamp and Overflow Survey No. 34, or any part thereof, but the said conveyance embraced all of said lands. It is not true that the executive order referred to in paragraph VI of plaintiff's Bill of Complaint did not embrace the premises covered in State Survey No. 34, or any part thereof. On the contrary, the court finds that said executive order embraced all of the lands covered by Swamp and Overflow Survey No. 34.

XLVIII.

It is not true that the executive order referred to in paragraph VII did not embrace the premises embraced in said Swamp and Overflow Survey No. 34, or any part thereof. On the contrary, the court finds that it embraced the whole thereof. It is not true that the possession taken by plaintiff of the premises embraced in Swamp and Overflow Survey No. 34 was secured by trespass or without right or color of title, and it is not true that until March 9, 1928, any

of the defendants were without legal capacity to maintain any legal action or equitable proceedings to recover possession of said premises, or to quiet the title of them, or any of them, in or to said premises, or that defendants had no legal or equitable remedy to repel any alleged trespass or entry of plaintiff, or its officers, agents or [160] attorneys. It is not true that defendants, or any of them, did everything they could to resist any entries, intrusions or alleged trespass of the plaintiff or its agents, prior to its acquiring said Federal patent to the State of California.

XLIX.

It is not true that any of the allegations in paragraph XII of plaintiff's Bill of Complaint are a collateral attack on any final decree or judgment of the Supreme Court of the District of Columbia. In this connection the court finds the United States of America was not a real or substantial party to the Mandamus Proceeding referred to and is not concluded by any judgment rendered therein. It is not true that the premises in controversy were a part of the public domain on September 28, 1850. It is not true that any township survey, including field notes, or report of the Surveyor were approved or accepted by the Secretary of the Interior, or returned any of said pemises as swamp and overflowed land as provided in and directed by the terms and provisions of the Act of July 23, 1866, nor did said or any identification confirm said patent issued by the State of California to David M. Darlington.

L.

It is not true that the survey referred to in plaintiff's Exhibit "C", or the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff, but the court finds that the survey and plat referred to in the deed, the selection of Secretary Kennedy and the reservation of President Fillmore was Mare Island as shown on the chart of San Francisco Bay by Cadwallader Ringgold; that said chart used by President Fillmore in reserving Mare Island was duly recorded and preserved in the office of the United States Surveyor General of California and was destroyed in the fire of 1906.

It is not true that the United States Surveyor General for California in the exercise of his judgment or discretion determined that the northerly boundary of Mare Island [161] extended to a point or station on San Pablo Bay to a point or station on the Napa River, the first station being designated on Freeman's Survey as Station 34, to said second station No. 138. It is not true that said alleged decision, so-called, of said Surveyor General was never modified by the Secretary of the Interior or was in full force or effect on the day the said fee simple patent issued by the plaintiff to the State of California; nor is it true that the said line is the northern line of Mare Island or is the southern boundary line of said premises said Swamp and Overflow Survey No. 34, nor does the northern boundary of Mare Island closely approximate the parallel intersecting the northerly highlands of Mare Island as depicted on defendants' Exhibit "B".

## CONCLUSIONS OF LAW.

From the foregoing Findings the court concludes as a matter of law that plaintiff is entitled to a judgment and decree adjudging and decreeing that complainant is the owner in fee simple absolute and possessed of all the real property described in paragraph II of plaintiff's Bill of Complaint, being the lands described and attempted to be described in said Swamp and Overflow Survey No. 34, and in the patent of said lands from the United States to the State of California; also adjudging and decreeing that neither the defendants nor any of them ever acquired or now have any right, title or interest in or to said lands or any part thereof by reason of the purported patents, conveyances or instruments mentioned or referred to in plaintiff's Bill of Complaint, and adjudging and decreeing that the conveyances and instruments through and by virtue of which defendants claim to derive a right, title or interest in the lands in question under David M. Darlington, patentee, from the State of California, and his grantees are void and of no effect; and that each such conveyance made to him and held by defendants be held for naught, surrendered and delivered up to the court for cancellation; that title in and to the lands described in paragraph II of [162] plaintiff's Bill of Complaint be quieted in complainant as against all or any adverse claim or claims of defendants herein or any of them, and that defendants be enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff; that plaintiff recover its costs of suit.

Done in open court this 29th day of December, 1933.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Jan. 17, 1934. [163]

In the Southern Division of the United States District Court for the Northern District of California

In Equity No. 2787-S

UNITED STATES OF AMERICA,

Complainant,

vs.

JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, WALTER E. BURKE, as administrator of EDMUND BURKE, deceased, WALTER E. BURKE, as trustee for VILLA M. BEHAN, VILLA M. BEHAN, formerly VILLA M. BURKE, S. J. SIMONS, V. M. PRICE, E. J. SULLIVAN, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the Complaint adverse to Complainant's title thereto,

Defendants.

## DECREE.

This cause having duly come on for trial before the above entitled court sitting without a jury, the

parties being represented by their respective attorneys, and the court having made its Findings of Fact and Conclusions of Law, and being duly advised in the premises:

It is adjudged and decreed that Complainant is the owner in fee simple absolute and possessed of all the real property described in paragraph II of Plaintiff's Bill of Complaint, to wit, being the lands described and attempted to be described in California State Swamp and Overflow Survey No. 34 and in the patent of said lands from the United States to the State of California, and which said lands are situated on Mare Island, in the County of Solano, State of California, and in the Northern Division of the Northern District of California, and are parti- [164] cularly described as follows:

"All that parcel and body of land known and designated as tract No. 38, containing 1473.95 acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering fractional Township 3 North, Range 4 West, M.D.B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the defendants claim, within its northerly portion, a strip or lot of ground reported to have been surveyed in the year 1856 on behalf, and under the authority of the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 con-

taining 164.55 acres and designated as a fractional portion of the south one-half of the southeast quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township 3 north, range 4 West, M. D. M. and M."

It is further adjudged and decreed that the defendants herein have not, nor has any of said defendants any right, title or interest in or to said lands or in or to any part thereof, by reason of the purported patents, conveyances or instruments mentioned or referred to in Plaintiff's Bill of Complaint, or for any reason.

It is further ordered, adjudged and decreed that the conveyances and instruments, including the alleged patent dated March 18, 1857, purporting to convey said lands included in [165] California State Swamp and Overflow Survey No. 34, a copy of which patent is annexed to Plaintiff's Complaint and marked Exhibit "E" and referred to and incorporated therein, and especially including the listing of the said lands by the Secretary of the Interior of the United States to the State of California as swamp and overflowed lands, made on March 9, 1928, and the alleged patent from the United States of America to the State of California bearing date the 9th day of March, 1928, purporting to convey said real property from the United States to the

State of California, a copy of which said patent is annexed to Plaintiff's Bill of Complaint and marked Exhibit "F" and referred to and incorporated therein, through and by virtue of which defendants claim to derive a right, title or interest in or to the lands in question under David N. Darlington, patentee from the State of California, and his grantees, are and each of them is void and of no effect, and that said conveyances made to the said David N. Darlington and held by defendants be and the same are void and held for naught.

It is further ordered, adjudged and decreed that said conveyances and instruments be surrendered and delivered up to the court for cancellation.

It is further ordered, adjudged and decreed that title in and to the lands described in paragraph II of plaintiff's Bill of Complaint and hereinabove described be and the same is hereby quieted in Complainant as against all or any adverse claim or claims of defendants herein or of any of them, and that defendants be and they are hereby enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff therein. [166]

The Court having on July 31, 1933, ordered judgment for plaintiff, and it appearing that one of the defendants therein, Walter E. Burke, died on August 18, 1933, and due cause therefor appearing, it is ordered that this Decree shall take effect as of said 31st day of July, 1933.

It is further adjudged and decreed that Plaintiff recover its costs taxed to the sum of $220.50.

Done in Open Court this 29th day of December, 1933.

A. F. ST. SURE,
United States District Judge.

Approved as to form as provided in Rule 22.

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Appearing in propria persona

[Endorsed]: Filed and entered Jan. 17, 1934. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk. [167]

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[Title of Court and Cause.]

## PETITION FOR SUBSTITUTION OF ATTORNEYS AND ORDER THEREON.

Comes now Villa M. Behan, formerly Villa M. Burke, who has heretofore appeared in said cause by her trustee, Walter E. Burke, and hereby respectfully shows to the Court that said Walter E. Burke died on the 18th day of August, 1933.

That said Walter E. Burke has also appeared in said action as administrator of the estate of Edmund Burke, deceased.

That your petitioner has been appointed administratrix of the estate of said Edmund Burke, deceased, in the place and stead of Walter E. Burke.

That your petitioner desires to join in and to prosecute an appeal from the decree heretofore given and made in the above entitled cause in her own

proper person in the place and stead of Walter E. Burke, trustee, and, also, in the capacity of administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, administrator of the estate of Edmund Burke; and, for that purpose, does hereby appoint James E. Kelby and Gordon Lawson as her solicitors in the place and stead of Walter E. Burke, deceased; and hereby respectfully requests the Court to permit said substitution to be made upon the records, files, and papers in said proceeding.

VILLA M. BEHAN,
Petitioner.
formerly Villa M. Burke.

It is so Ordered:
A. F. ST. SURE,
Judge.
Dated: Jan'y. 17, 1934. [168]

United States of America,
Southern District of California,
Central Division—ss.

Villa M. Behan, formerly Villa M. Burke, being by me first duly sworn, deposes and says: that she is the petitioner in the above entitled action; that she has read the foregoing petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are

therein stated upon her information or belief, and as to those matters that she believes it to be true.

VILLA M. BEHAN,
formerly Villa M. Burke.

Subscribed and sworn to before me this 14th day of December, 1933.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 17, 1934. [169]

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[Title of Court and Cause.]

PETITION FOR ORDER TO SUBSTITUTE VILLA M. BEHAN, formerly VILLA M. BURKE, IN THE PLACE AND STEAD OF WALTER E. BURKE, as trustee.

Comes now Villa M. Behan, formerly Villa M. Burke, by her solicitors, James E. Kelby and Gordon Lawson, and respectfully shows to the Court that she is one of the defendants named in the above cause, appearing herein by her said trustee, Walter E. Burke.

That Walter E. Burke died on the 18th day of August, 1933.

That the trust under which said Walter E. Burke was acting during his lifetime for said Villa M. Behan, formerly Villa M. Burke, arose out of the execution and delivery of a grant deed to Walter E.

Burke, during his lifetime, as trustee for Villa M. Behan, formerly Villa M. Burke, of an undivided twenty-seven percent (27%) interest in and to certain of the lands and premises involved in the above entitled action; that the trust so created is a naked trust and no provision is contained therein for the appointment of a new trustee upon the death or resignation of the trustee appointed thereby; that Villa M. Behan, formerly Villa M. Burke, is the sole beneficiary named in said grant deed, and is the sole beneficiary in the trust created thereby.

That said Villa M. Behan, formerly Villa M. Burke, desires to appear in said action in her own proper person and to join with the other defendants in said action in the prosecution of an appeal from the decree heretofore given and made in the above entitled cause. [170]

WHEREFORE, your petitioner prays that an order may be made herein substituting Villa M. Behan, formerly Villa M. Burke, in her own proper person, in the place and stead of Walter E. Burke, as trustee for said Villa M. Behan, formerly Villa M. Burke.

VILLA M. BEHAN,
formerly VILLA M. BURKE, and
KELBY E. LAWSON,
Solicitors for Petitioner.

It is so Ordered:

A. F. ST. SURE,
Judge.

Done in open court this 13 day of February, 1934.

United States of America,
Northern District of California,
Southern Division—ss.

Villa M. Behan, formerly Villa M. Burke, being by me first duly sworn, deposes and says: that she is the petitioner in the above entitled action; that she has read the foregoing petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

VILLA M. BEHAN,
formerly Villa M. Burke.

Subscribed and sworn to before me this 9th day of February, 1934.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 13, 1934. [171]

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[Title of Court and Cause.]

**PETITION FOR SUBSTITUTION OF VILLA M. BEHAN AS A PARTY DEFENDANT IN THE PLACE AND STEAD OF WALTER E. BURKE, AS ADMINISTRATOR OF THE ESTATE OF EDMUND BURKE, DECEASED.**

Comes now James E. Kelby and respectfully suggests to the Court the following matters and things

happening subsequent to the decision heretofore rendered in the above cause:

That Walter E. Burke, who is named as one of the defendants herein as administrator of the estate of Edmund Burke, deceased, died on the 18th day of August, 1933.

That, thereafter, such proceedings were had and taken in the matter of the estate of Edmund Burke, deceased, in the Superior Court of the State of California, in and for the County of Los Angeles, that Villa M. Behan was appointed administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, administrator, now deceased.

WHEREFORE, affiant prays that an order be made herein substituting said Villa M. Behan as administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, as administrator of the estate of said Edmund Burke, now deceased.

KELBY & LAWSON,
JAMES E. KELBY,
Solctrs. for movant.

It is so Ordered:
A. F. ST. SURE,
Judge.

Done in open court this 13 day of February, 1934.

[172]

United States of America,
Northern District of California,
Southern Division—ss.

James E. Kelby, being by me first duly sworn, deposes and says: that he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JAMES E. KELBY.

Subscribed and sworn to before me this 9th day of February, 1934.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 13, 1934. [173]

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[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

(NOTE: Plaintiff's exhibits "A" to "U", inclusive, and the testimony respecting same, were offered and received in evidence, subject to reserved objections by defendants, which have been incorporated and are found in defendants' written motion to exclude, set forth in the transcript herein; objections to the remainder of plaintiff's exhibits, and the exceptions to the rulings thereon, are set forth in the statement of evidence.)

## TESTIMONY OF MISS IVA FRANCES BAILEY

A Witness for Plaintiff.

I am an employee in the office of the United States Surveyor General for California and have been there for thirty-seven years. Prior to the San Francisco earthquake and fire in 1906, there was in the possession and in the custody of that office the records and archives of the Mexican Government of California, also the records of land claims under Spanish grants presented to the Land Commission in California. I understand that all original papers connected with the grant were also on file in the office. The effect of the fire of 1906 was a total destruction of all of these papers with the exception of a few that were in the safe.

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## TESTIMONY OF FRANK E. BARKER.

A Witness for Plaintiff. [174]

I am the office cadastral engineer in the Office of the Public Survey, which was formerly the United States Surveyor General for California. I have been there since 1909. I have had occasion to make a search through the archives of that office for the records and archives of the Mexican Government prior to the acquisition of California by the United States and have found some of them. The proceedings before the Land Commission in the case of the confirmation of Mare Island I have been un-

(Testimony of Frank E. Barker.)

able to find. There appears to be an incomplete expediente on the original documents that were submitted as exhibits to the Land Commission at the time of the application for confirmation. I do not find the original document of the grant from Juan B. Alvarado to Castro, nor the original conveyance from Castro and wife to Frisbee & Simmons, granting a one-half interest, nor a deed from Victor Castro to George Bissell, of a one-tenth interest in the property, nor a deed from Frisbee & Simmons to Victor Castro, of a one-tenth interest in the property, nor a deed from Billings, Patton & Halleck, as assignees of Simmons, to George Bissell, of an undivided sixty-seven/eightieths of Mare Island, or any other deed to them. I did not find a deed from Simmons to Billings, Patton & Halleck, nor a deed from Simmons & Stowell to Billings, Patton & Halleck, purporting to convey an undivided one-half of sixty-seven/eightieths of Mare Island, nor a deed dated October 5, 1849, from Victor Castro by Mariano C. Vallejo, as Attorney-in-Fact to Bissell, Simmons & Frisbee. I found a record of these documents before the Land Commission in the records and application for confirmation in the Land Commission.

Mr. BURKE: I am going to stipulate to all of these conveyances. I will stipulate that any right, title or interest that Victor Castro had under the grant of Mare Island was passed through him to successors who subsequently transferred the same to the United States of America. Of course, I do not

(Testimony of Frank E. Barker.)

stipulate the grant. I will stipulate that Victor Castro made application for this Mare [175] Island and that a temporary license was issued to him by Jimeno, the Secretary of State.

WITNESS continuing: I produce now the Dyer Survey. I also produce the Joy Survey.

The COURT: That first map introduced was the Dyer Survey and that is the map which has the pencil marks upon it with an asterisk in the upper portion of the figure below the word and number "Section 10" and on one side of this pencil mark appears the legend, "Surveyed June 11 and 12, 1855, by County Surveyor for David N. Darlington," etc. Is this what is known as the Dyer Survey or plat of the Dyer Survey?

A. Yes.

(The Dyer Survey and Joy Survey were offered in evidence as "Plaintiff's Exhibits A and B", respectively.)

The COURT: Referring to Exhibit "B", what does that plat show?

A. This is a sectionized survey of a portion of Mare Island, excluding Swamp and Overflowed Tract 34.

Mr. PECKHAM: We offer from the record in United States vs. Bissell and Aspinwall, a certified copy of the transcript of proceedings before the Land Commission in the matter of the application for the confirmation of the Victor Castro grant, also copy of the expediente and the translation thereof used by the Land Commission, the order of reference and the informe and return of the Justice

(Testimony of Frank E. Barker.)

of the Peace, also grant of Juan B. Alvarado to Victor Castro of Mare Island.

Mr. BURKE: Why do you want to put those in? I have stipulated to those.

Mr. PECKHAM: I understand that counsel is stipulating that the title of Victor Castro passed by mesne conveyances from the confirmees to the United States.

Mr. BURKE: Any title that he had passed to the United [176] States through the Bissell conveyance, if he had any.

Mr. PECKHAM: We offer the decree of confirmation and the opinion of confirmation by the Land Commission, showing confirmation of Mare Island to Bissell and Aspinwall, together with the entire record in the United States District Court in the case of United States vs. Bissell and Aspinwall, No. 311.

(The record in case No. 311, United States vs. Bissell, et al., is offered in evidence as "Plaintiff's Exhibit C".)

PLAINTIFF'S EXHIBIT C

[Endorsed]: Filed June 18, 1934. United States Circuit Court of Appeals.

TRANSCRIPT OF THE PROCEEDINGS

In Case

No. 307

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G. W. P. BISSEL and
WILLIAM H. ASPINWALL,

Claimants,

vs.

THE UNITED STATES,

Defendant,

For the Place Named
"YSLA de YEGUA" or "MARE ISLAND"

---

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
In the State of California.

BE IT REMEMBERED, that on this thirty first day of August, Anno Domini One Thousand Eight Hundred and Fifty-two, before the Commissioners to ascertain and settle the Private Land Claims in the State of California, sitting as a Board in the City of San Francisco, in the State aforesaid, in the United States of America, the following Proceedings were had, to wit;

The Petition of G. W. P. Bissel & William H. Aspinwall, for the Place named "Ysla de Yegua" or "Mare Island", was presented, and ordered to be filed and docketed with No. 307 and is as follows, to wit;

(Vide page 3 of this Transcript.)

Upon which Petition the following subsequent Proceedings were had in their chronological order, to wit;

San Francisco, April 20, 1854.

In Case No. 307, G. W. P. Bissell et al: for the "Ysla de Yegua", the deposition of Stephen Cooper, a witness in behalf of the United States, taken before Commissioner Peter Lott, was filed;

(Vide page 5 of this Transcript.)

San Francisco September 26, 1854.

Case No. 307 was ordered to be placed at the foot of the 2d class cases on the Trial Docket.

San Francisco, October 12, 1854.

In the same case the deposition of Juan B. Alvarado, a witness in behalf of the Claimants, taken before Commissioner Peter Lott, was filed;

(Vide page 9 of this Transcript.)

San Francisco, October 19, 1854.

In the same case the deposition of Mariano G. Vallejo, a witness in behalf of the Claimants, taken before Commissioner Alpheus Felch, was filed;

(Vide page 19 of this Transcript.)

San Francisco, Oct. 20, 1854.

In the same case the deposition of Juan José Castro, a witness in behalf of the Claimants, taken before Commission Peter Lott, was filed;

(Vide page 21 of this Transcript.)

San Francisco November 1, 1854.

In the same case the deposition of William McDaniel, a witness in behalf of the United States, taken before Commissioner R. Aug. Thompson, was filed;

(Vide page 25 of this Transcript.)

San Francisco, November 6, 1854.

In the same case the deposition of L. B. Meizner, a witness in behalf of the United States, taken before Commissioner S. B. Farwell, was filed;

(Vide page 27 of this Transcript.)

San Francisco, November 7, 1854.

Case No. 307 was submitted on briefs and taken under advisement by the Board.

San Francisco, May 8, 1855.

In the same case Commissioner S. B. Farwell delivered the opinion of the Board confirming the claim;

(Vide page 65 of this Transcript.)

and the following order was made towit:

(Vide page 69 of this Transcript.)

## PETITION

To the Honorable Commissioners to Settle Private Land Claims in California.

The petitioners George W. Bissell and William H. Aspinwall respectfully show.

That on the 31st day of October A. D. 1840 Manuel Jimeno Casarin Governor ad interim of California made a provisional grant to Victor Castro of the Island called "Isla de la Yegua" in the present County of Sonoma.

That on the 20th day of May A. D. 1841, Juan B. Alvarado Gov of California by virtue of authority of law in him vested granted to the said Victor Castro in fee the said tract of Land Mare Island a copy of which grants are herewith submitted marked "A". with a translation marked "B".

That on the 28th day of May A. D. 1850 the said Victor Castro sold and conveyed the said tract of land to said John B. Frisbee and Bezer Simmons of the firm of S. H. & Co. a copy of which conveyance is submitted herewith marked "C".

That on the 3d day of September A. D. 1850 the said Bezer Simmons and the said Simmons Hutchinson & Co. by Deeds of Assignment conveyed his interest in the said tract of land to F. Billings, I. R. Bolton and H. W. Halleck a copy of which Deeds of Assignment is submitted herewith marked "D".

That on the 15th day of August A. D. 1850 the said John B. Frisbee sold and conveyed a part of his interest in said tract of land to the petitioner William H. Aspinwall, a copy of the record of

which conveyance is submitted herewith marked "E".

That on the 16th day of July A. D. 1852 the said John B. Frisbee sold and conveyed his remaining interest in said island to the petitioner G. W. P. Bessell a copy of which conveyance is submitted herewith marked "F".

That on the 1st day of July A. D. 1852 the said Billings, Bolton and Halleck sold and conveyed to the petitioner G. W. P. Bissell the interest of said Bezer Simmons and Simmons Hutchinson and Company in the aforesaid tract of land a copy of which conveyance is submitted herewith marked "G".

That on the 25th day of May A. D. 1850 the said Simmons and Frisbee sold and conveyed to Victor Castro one undivided tenth part of said island as shown by the original conveyance a copy of which conveyance is submitted herewith marked "H".

That on the 20th day of July A. D. 1852 the said Castro sold and conveyed the said one undivided tenth part of said island to the petitioner G. W. P. Bissell a copy of which conveyance is submitted herewith marked "I".

And the petitioners further show that the said tract of land has not been surveyed by the Surveyor General of the United States such survey not being necessary, the land being an island and its boundaries easily defined; that moreover the petitioners and those under whom they hold have been for 12 years and now are in the quiet and undisputed possession and occupation of said island.

That they know of no conflicting claim. That they rely for confirmation of title upon the original papers, copies of which are submitted herewith upon the records and minutes in the archives now in charge of the Surveyor General and upon such other and further proofs as they may be advised are necessary.

Wherefore they pray the Commissioners to confirm to them the aforesaid tract of land.

By their Attys.

Halleck, Peachy & Billings

Filed in office Aug. 31, 1852.

(Signed) Geo. Fisher Secy.

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DEPOSITION OF S. COOPER

United States of America,
State of California.—ss.

San Francisco, April 20, 1854.

This day personally came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State Stephen Cooper a witness on behalf of the United States in Case No. 307 on the docket of said Board wherein G. W. Bissell and William H. Aspinwall are claimants. And the said witness being duly sworn on oath deposed in the English language as follows, to wit:

The Claimants Attorney is present.

1st Question.

What is your name, age and present residence?

Ans. My name is Stephen Cooper. My age is 57 years. My residence Solano County California.
2d Question.

Are you acquainted with Isla de la Yegua (Mare Island). If yea state where it is, how far you reside from it and how long you have known it?

Ans. I am acquainted with the island mentioned. It is situated in San Pablo Bay just below the Straits of Carquinas about 6 miles from Benicia. I was some 11 miles from it. I have known the island ever since the fall or early winter of 1847.
3d Question.

Look at the paper now shown you marked Exhibit No. 1 to the Deposition of Stephen Cooper, P. L. and say whether you have ever seen it before. If yea, state where, when and under what circumstances?

Answer.

I believe I have seen the paper before. I would not sware to a bit of paper. I have seen a similar paper.

I do not remember the time precisely when I saw the paper, but it was some time in 1850, at Benicia. It was shown to me by Capt. Frisbee who claimed to have a title to the island from Victor Castro. Frisbee showed me the paper to proove his title to the island, because he understood I was backing some young men who were occupying the island against his wishes and I had told him if he had a good title he should have no trouble with the young men.

His object was to get the young men off and get the possession himself. Lancing B. Meisner acted as interpretor for me when the paper was produced on that occasion. I called Capt. Frisbee's attention to the writing on the 2d page of the document and told him—

It is strange this writing appears here now, and it was not here in the winter of 1847 & 1848. He asked me if I thought that he forged it. I replied I did not, but I thought somebody had.

4th Question.

Did you ever get Mr. Misner to act as interpretor or translator of any document relating to Mare Island more than once?

Answer.

Never except the one time.

5th Question.

State why you informed Capt. Frisbee that the grant had been written on the paper after the year 1848?

Answer.

I am not able to say whether I judged from my having seen the paper and noticed the difference by ocular inspection or whether it was heresay which directed my attention to that point, and induced me to speak to him of it as I did. I had in the winter of 1847 and 1848 sent to Monteray to have the archives searched as Castro said he had a title then. I then thought of purchasing but I learned in some way that there was no sufficient title and gave up all idea of buying whether I saw the paper or not. I do not recollect.

I may have been informed of its character through Dr. Simple who went to Monteray for me or through others.

Claimants Counsel objects to the proofs respecting the archives as illegal.

Cross Examined by Claimants Counsel

1st Question.

What time in 1847 was it that you were negotiating or talking of a purchase of the island, and with whom?

Answer.

I cannot say nearer than that it was in the winter of 1847 or 1848. It was rainy weather. It was with Victor Castro, Doct. Simple and myself. The Dr. had learned some Spanish and did the talking.

2d Question.

When you were having this conversation, were the papers exhibited to you?

Answer.

I do not think they were. Dr. Simple went to Castro house with him to see his papers.

3d Question.

When was the time then that you saw the papers which has been exhibited to you here?

Answer.

The time was in the spring of 1850 or about that time when Capt. Frisbee showed it to me as I before stated.

Stephen Cooper

Subscribed and sworn to before me on this 20th day of April A. D. 1854.

Peter Lott
Commissioner for taking testimony &c.

Filed in office Aug. 20, 1854.

(Signed) Geo Fisher Secy.

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DEPOSITION OF JUAN B. ALVARADO.

United States of America,
State of California—ss.

San Francisco, Oct. 10, 1854.

This day came before Peter Lott, Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan B. Alvarado a witness on behalf of the claimants G. W. P. Bissell and William H. Aspinwall in Case No. 307 on the docket of said Board and said witness being sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows.

The U. S. Law Agent is present.

Questions by Capt. Halleck, Attorney for claimant.

1st Question:

What is your name, age and residence?

Answer:

My name is Juan B. Alvarado. My age 43 years, and residence, Contra Costa County, California.

2d Question:

Are you acquainted with the place called Mare Island. If yea, where is it?

Answer:

I am acquainted with it. It *it* is in the Bay of San Francisco near the Straits of Carquinas.

3d Question:

Did you ever as Governor of California make a grant of said Island to any one. If yea, to whom?

Answer:

I did as Governor, grant it to Victor Castro.

4th Question:

Look at the document, now shown to you, marked Exhibit 1 to deposition of S. Cooper. P. L. and also exhibited in this deposition and heretofore filed in this case and state if you know the handwriting and signatures to said document if yea. State your means of knowledge and also whether they are genuine?

Answer:

I know the handwriting of Manuel Jimeno and Jose Z. Fernandez. I have seen them both write and their signatures as they here appear are genuine and this is also my own proper signature which I signed here at the time the paper was dated.

The body of said document on the first page is written by said Jose Z. Fernandez and the body of the second page is in my own hand writing.

5th Question:

State what you know of the occupation of said Island by said Victor Castro?

Answer:

In the year 1844 as I passed by the Island I saw horses on it belonging to said Castro and Castro

and I took horses from the Island and crossed over and went to Sonoma. I understood and was well satisfied said Castro occupied said Island before he obtained said grant.

6th Question:

Is the place called by this name an Island surrounded by water?

Answer:

I think it is an Island.

Cross Examined by U. S. Law Agent.

1st Question:

Do you know where the Bay of San Pablo is?

Answer:

I think I do. It is a part of the Bay of San Francisco.

2d Question:

Is Mare Island in the Bay of San Pablo?

Answer:

No.

3d Question:

Are you acquainted with Mr. Frisbee's son-in-law, Genl. Vallejo?

Answer:

Yes. I am.

4th Question:

Have you ever had any conversations with him about this Mare Island?

Answer:

I do not remember ever to have had any conversation with him on this subject.

5th Question:

Have you a distinct recollection of having signed the document which has been exhibited to you in this case?

Answer:

I do not remember the act of signing it, though I know it is my signature and that I did sign it I have no doubt.

6th Question:

Where were you when you signed it?

Answer:

I ought to have been at the place where the paper is dated. I ought to be in Monterey.

7th Question:

Do you recollect positively where you were when you signed said document?

Answer:

I recollect what I have already answered.

8th Question:

Do you decline to give a direct answer about your recollection?

Answer:

I do not.

9th Question:

Then answer the question directly whether you remember where you were when you signed it?

Answer:

I would say independent of the document as a means of refreshing my memory that I was at Monterey.

10th Question:

In what house at Monterey were you?

Answer:

I do not remember.

11th Question:

Do you know independent of the wording of the instrument, that you signed it in Monterey?

Answer:

I do know that I did sign it in Monterey, independent of the wording of the document.

12th Question:

By what circumstances do you recollect it?

Answer:

Because I was Governor and I was at the head of the Department at the seat of Government at that time.

13th Question:

Who was Secretary at that time?

Answer:

I think Jimeno was.

14th Question:

Who petitioned for the grant in this case?

Answer:

I do not remember.

15th Question:

Was there any record of said grant kept in the archives?

Answer:

I do not remember.

16th Question:

Was it usual to keep a record of such grants?

Answer:

There was a book in which an entry was made of such grants generally though the Secretary might forget it.

17th Question:

How many grants did you ever make and write them out yourself?

Answer:

I cannot remember how many.

18th Question:

Did you ever write any besides this?

Answer:

I think I have.

19th Question:

What one?

Answer:

I cannot recollect now any particular one.

20th Question:

Why did you write this grant?

Answer:

I did it because I choose to do it and had the authority to do it.

21st Question:

In whose presence did you write?

Answer:

I do not remember.

22d Question:

Do you recollect having written it?

Answer:

I do not remember the act of writing it.

23d Question:

How long after you signed the Yerba Buena Island grant did you sign this grant?

Answer:

I do not remember.

24th Question:

How long before you signed it was it that you saw the horses on the Island?

Answer:

I never saw any horses there before I signed the title.

25th Question:

Why did not Jimeno sign this grant as Secretary?

Answer:

It might have happened that I did not order him to do it, or that he forgot it.

26th Question:

From whom did you receave this document when you wrote and signed the grant?

Answer:

I do not now remember from whom I receaved it.

27th Question:

How long was it in your possession before you wrote the grant in it?

Answer:

I do not recollect.

28th Question:

Had the paper been filed before you wrote the grant?

Answer:

I do not remember whether it had.

29th Question:

Had it ever been in the hands of the interested party before you wrote the grant on it?

Answer:

I do not recollect now, tho it is probable it had been.

30th Question:

Had you ever seen it before the time when you wrote the grant?

Answer:

I do not remember to have seen it before that occasion.

31st Question:

Had you ever heard of it before?

Answer:

Yes I had. I believe that Jimeno told me at Monteray about the time I made the grant that he had given the provisional grant to the Land.

32d Question:

Was it before or after you made the grant?

Answer:

I believe he told me before.

33d Question:

How long before?

Answer:

I do not remember.

34th Question:

Where were you when he told it to you?

Answer:

I think I was in Monterey. I cannot remember the exact house or spot.

35th Question:

What led to the conversation?

Answer:

I do not remember.

36th Question:

What did he tell you?

Answer:

I do not remember.

37th Question:

Had you ever been at Mare Island before you made the grant?

Answer:

I had not.

38th Question:

When did you first know it by that name?

Answer:

I have heard it called by that name for a long time. I do not know how long, but I heard it before I made the grant.

39th Question:

From whom did you hear it?

Answer:

I cannot remember any particular person. It was publicly called and known by that name. I recollect Jimeno told me of the grant by him and spoke of it by that name.

40th Question:

What did you know of said Island before you made the grant?

Answer:

I had never seen it or had any personal knowledge of it before that. I had heard that Victor Castro

either had put on or was about putting horses on the said Island and occupying it.

41st Question:

Had you heard anything else about it?

Answer:

I do not remember to have heard anything else.

42d Question:

How many grants did you make of land while you were Governor where you had no knowledge either by report or otherwise of the land?

Answer:

I do not remember.

43d Question:

Did you ever make any without such knowledge?

Answer:

Yes. Various ones.

44th Question:

Name some of them.

Answer:

I do not remember any besides the grant in question.

45th Question:

Was it not your constant practice when you were ignorent of the land applied for to refer it to some local authority for report or information before you made the grant?

Answer:

It was not. I required such information in some cases, and not in others as it suited my views at the time.

46th Question:

Without information on the subject how could you tell what to grant?

Answer:

I knew or understood in some manner sufficient to decide upon the business of my Government at that time.

47th Question:

In what manner did you know enough in this case for the purpose of granting the Island in question?

Answer:

I got information from Jimeno of the business before I made the grant. I do not now remember what he told me.

48th Question:

How did you know Castro wanted the grant?

Answer:

Probably Jimeno told me so.

49th Question:

State all that Jimeno had to do with making the grant or giving information in the case?

Answer:

I cannot now recollect the particulars of this matter, but it is most likely that Jimeno had same proceedings in the business and informed me of it, and that I therefore went on and made the grant out. I cannot be posative as to the exactness of what did transpire.

50th Question:

Why did you not as was your usual custom first make a decree annexed to the Expedient and then make the grant on a separate piece of paper?

Answer:

Because I was sufficiently well satisfied with what I did.

JUAN B. ALVARADO.

Subscribed and sworn to before me on this 10th day of October A. D. 1854.

PETER LOTT,
Commissioner.

Filed in office Oct. 12, 1854.

(Signed) GEO. FISHER,
Secy.

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DEPOSITION OF M. G. VALLEJO.

United States Land Commission.

San Francisco, Oct. 19, 1854.

On this day before Commissioner Alpheus Felch came Mariano G. Vallejo a witness on behalf of the claimants G. W. P. Bissell et al. Case No. 307 who after being duly sworn deposed as follows:

Questions by Capt. Halleck attorney for claimants.

1st Question:

Please state your name, age, and place of residence?

Answer:

My name is Mariano G. Vallejo. My age 47 years and I reside at Sonoma in California.

2d Question:

Do you know the place called Mare Island. If yea, where is it situated?

Answer;

I do know it. It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two

and a half miles in length. It is irregular in its width and contains about a half a league of land, a little more or less.

3d Question:

State what you know of the occupation of the Island?

Answer:

*I* was occupied by Victor Castro a long time ago by putting his horses on it. He commenced putting them there in 1839 or 1840 according to my best recollection and continued to keep them there until 1850. He had a little correl there. The horses were seventy or eighty in number.

4th Question:

Did you ever see the title papers of said Island. If yea, when?

Answer:

I saw them some twelve years ago.

5th Question:

Please look on the paper now here presented to you being marked "Exhibit 1 to Depo. of S. Cooper P. L." heretofore filed in this case and also marked as filed on the tenth day of Sept. 1853 and state whether this is the title paper alluded to in the last question and answer?

Answer:

It is the same.

M. G. VALLEJO.

Mr. McKum, Law Agent, attended at the taking of this deposition but propounded no questions to the witness.

Subscribed and sworn to before me this 19th day of October, A. D. 1854.

ALPHEUS FELCH,
Commissioner.

Filed in office Oct. 19th, 1854.
(Signed) Geo. Fisher, Secy.

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DEPOSITION OF JUAN JOSE CASTRO.

United States of America,
State of California.—ss.

San Francisco Oct. 19, 1854.

This day came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan Jose Castro a witness on behalf of the claimants G. W. P. Bissell, and William H. Aspinwall in case No. 307 on the docket of said Board, and said witness being duly sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows:

The U. S. Law Agent is present.

Questions by Judge Sutherland for Claimants.

1st Question.

What is your name, age & place of residence?

Answer.

My name is Juan Jose Castro. My age 52 years. My residence Contra Costa County, California.

2d Question.

Do you know the place called Mare Island. If yea, state what you know of its occupation?

Answer.

I do know the said Island. Victor Castro occupied it in the year 1840 by putting mares and horses on it, and he built a hut there for the Indians in charge of said stock and a corral for the stock. I assisted in putting said mares and horses on the Island.

Cross Examined by U. S. Law Agent.

1st Question.

How many Islands did Gov. Alvarado ever grant to you?

Answer.

Only one, the Island of Yerba Buena.

2d Question.

Are you a brother to Victor Castro the grantee in this case?

Answer.

I am.

3d Question.

How many mares and horses were put on the Island at the time you have mentioned?

Answer.

About 50 head.

4th Question.

Was that before or after the grant was made?

Answer.

It was after the grant in the same year.

5th Question.

Where did you take animals from?

Answer.

From San Pablo.

6th Question.

Which Island was granted first Yerba Buena or Mare Island?

Answer.

The Island of Yerba Buena was first granted.

7th Question.

How do you know?

Answer.

Because it was granted to me.

8th Question.

Were both grants made at the same place?

Answer.

I came here to give testimony concerning Mare Island and when that is done you can ask concerning the other.

9th Question.

How did you take the mares from San Pablo to Mare Island and who was with you?

Answer.

We drove them to the Straits and then took them over in boats to the Island. There were some Mexican and Indian servants with me. 3 Mexicans and 4 or 5 Indians.

The Mexicans were Manuel Andres, Mariano and Olvera, and I do not know the names of the Indians. Victor Castro was along with us.

10th Question.

How long were you taking the mares to the Island?

Answer.

We were 3 or 4 hours going from San Pablo to the Straits, and we were 2 days putting them on the Island.

11th Question.

How long did you all stay on the Island after you got the stock all over?

Answer.

Victor and myself went away after it was all done and we left the Indians there to take care of the stock.

12th Question.

What time in 1840 was this done.

Answer.

I do not remember what month it was, though I think it was in October or November. The rainy season had commenced.

13th Question.

When were you next at the Island and how long?

Answer.

I was there in the following year in June. We were there but a short time. We just went there to get some horses to ride.

14th Question.

Who went with you?

Answer.

Victor Castro the grantee in this case.

15th Question.

When were you next there?

Answer.

I have not been there since.

16th Question.

To what place did you ride the horses you took from the Island in 1841 and how long did you stay?

Answer.

We went to Sascal to land the horses there. We were there 3 or 4 days.

17th Question.

Where did you go then?

Answer.

We went and left the horses on the Island, and then we went to San Pablo.

18th Question.

On what part of the Island was the corral built?

Answer.

It was on the left hand side of the Island as you enter the Straits going to Napa.

19th Question.

How many tame horses were there among those on the Island?

Answer.

Some 10 or 12.

Re-examined by Claimants Counsel.

1st Question.

When you say that the horses were placed on the Island after the grant, state what grant you mean?

Answer.

I mean the first provisional concession by Jimeno.

Juan Jose Castro.

Subscribed and sworn to before me on this 19th day of October A. D. 1854.

Peter Lott Comr. & C.

Filed in office Oct. 20th, 1854.

(Signed) Geo. Fisher, Secy.

## DEPOSITION OF WILLIAM McDANIEL.

United States Land Commission

San Francisco, Nov. 1, 1854.

On this day before Commissioner R. Aug. Thompson came William McDaniel a witness on behalf of the United States in Case No. 307 in which case G. W. P. Bissell et al. are claimants who after being duly sworn deposed as follows:

Present U. S. Law Agent & Mr. Halleck for claimants.

Witness states that his name is William McDaniel, his age fifty four years and residence Solano County California.

Question by Law Agent.

Are you acquainted with the place called Mare Island. If yea, state what you know in relation to the grant of said Island and of the document filed in this case as evidence of title marked Exhibit 1 to Depo. of S. Cooper P. L.

Answer.

I can only state that in the spring of 1850 Stephen Cooper showed me a paper purporting to be a permit to one Castro to pasture mares and colts on the Island. Said document was I think in the Spanish language and was translated to me by Mr. Misner, or it might have been a written translation of the document.

Mr. Cooper presented said papers to me in order to obtain my opinion as to whether it was sufficient to prevent his taking a preemption on said Island.

In reply I informed him that I did not think it offered any obsticle to such preemption.

Some time afterwards in the spring or early in the summer said Cooper informed me that Mr. Frisbee had brought the same paper back with a grant upon the back of it and prohibited him from selling in or occupying said Island.

I did not see the papers at that time. Nor am I able to state that the document referred to in the question is the same paper.

(The latter clause of this answer objected to by claimants Atty. on the ground that it is hearsay)

William McDaniel

Subscribed and sworn to before me Nov. 1st, 1854.

R. Aug Thompson, Comr.

Filed in office Nov. 1st, 1854.

(Signed) Geo. Fisher, Secy.

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## DEPOSITION OF L. B. MIZNER

San Francisco Nov. 4th 1854.

On this day before Commissioner S. B. Farwell personally came L. B. Mizner a witness on behalf of the Government in case No. 307 and after being duly sworn deposed as follows:

1st Question.

What is your name, age and place of residence?

Answer.

My name is L. B. Mizner, age twenty seven years, residence Benicia.

2d Quesiton.

Are you acquainted with the original grant from Gov. Jimeno and Juan B. Alvarado to Victor Castro marked Exhibit 1 attached to the deposition of

S. Cooper—if yea state all you know in regard thereto?

Answer.

I saw the paper in the year 1850 and interpreted the same to Major Stephen Cooper. So much as is on the first page which purports a permit to pasture horses on the Island. As to what is contained on the back I had no recollection whether it was there or not which purports to be a grant from Gov. Alvarado.

3d Question.

What is your impression as to the second grant being on the paper at the time you examined the same?

Answer.

My impressions are that the second grant was not on the paper at the time I examined the paper, but don't know whether I got the impressions from the inspection of the paper at the time or from what has since been said to me in reference to the matter by Dr. Simple and Major Cooper. Dr. Simple is now dead.

Questions by Claimants Counsel.

1st Question.

What time in the year 1850 was it that you saw the paper?

Answer.

I am not able to state, don't know that I could say within twelve months of the time.

2d Question.

What means have you of knowing this to be the same paper that was shown you at the time?

Answer.

Nothing only from my recollection of its appearance and contents. I do not know the handwriting in which it is written.

L. B. Mizner

Sworn to and subscribed before me on 4th Nov. A. D. 1854.

S. B. Farwell, Comr.

Filed in office Nov. 4th, 1854.

Geo. Fisher, Secy.

Office of the Surveyor General of the United States for California.

John C. Hays, Surveyor General of the United States for the State of California and as such now having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican Territory or Department of Upper California, by virtue of the power vested in me by law, do hereby certify that the three preceding and hereunto annexed pages of tracing paper numbered from one to three inclusive exhibit a true and accurate copy of a document now on file and forming a part of the said archives in this office.

In testimony whereof, I have hereunto signed my name officially and caused my seal of office to be affixed at the City of San Francisco this twenty ninth day of September, 1853.

John C. Hays

U. S. Surveyor Gl. California.

Filed in office Jany. 19, 1854.

Geo. Fisher, Secy.

TRANSLATION OF EXPEDIENT.

Stamp Third. Two Reales.

Provisionally authorized by the Maritime Custom House of the Port of Monterey in the Department of the Californias for the years 1840 and 1841 Alvarado.

ANTONIO MARIA OSIO.

(Custom House Stamp)

Senor Prefect of the 1st District

Jose Victor Castro a native of and resident in this Department before the known justification of Your Excellency as is proper and lawful presents himself and represents.

That it being well known that we generally every year receive injuries from the Indians by robberies, etc. and as I have no secure place to put my little stock, I am under the necessity of coming to the goodness of Your Excellency and as there is an adjacent Island in the Bay of San Francisco called "Mare Island" which has no owner, of asking that it may be granted to me for depositing my said stock where it will be safe from the injuries which happen from said Indians.

I know Senor that it will make me some expence to pass over to said Island my small property but I will do it and with pleasure in order to secure what little remains to me.

Wherefore I beg and pray that you will be so good as to decree in favor of the Petitioner [illegible] etc.

Monterey, October 30th, 1840.

JOSE VICTOR CASTRO.

(In the Margin)

San Juan de Castro,
October 30, 1840.

Pass this Petition to the Justice of the Peace of the Contra Costa for report of the said adjacent Island which Citizen Victor Castro asks for is vacant and if it can be granted and this being done return it for decision.

CASTRO.

In virtue of the Superior decreto which precedes of Senor Prefect Don Jose Castro which you have been so good as to send to me on the petition for the Island called "de la Yegua" I ought to say that said Island belongs rather to the Coast of San Solano than to that of San Pablo, and that to the present time it is vacant and this authority does not know as any citizen has ever pretended to it, this is what I ought to say in compliance with what is asked of me.

God and Liberty. Rancho of San Antonio, November 4th, 1840.

GRACIA PERALTA.

Most Excellent Senor Governor:

Having seen the contents of this petition and the Report of the Justice of the Peace of Contra Costa and all else presented the Prefecture reports that the petitioner possesses the legal requisits to entitle him to be attended to and that the Island asked for call "La Yegua", (Mare Island) is vacant and with-

out any person pretending to it, leaving the matter to your Excellency's pleasure.

San Juan Bautista, Nov. 14th, 1840.

JOSE F. CASTRO.

Filed in office Jan 19, 1854.

(Signed) GEO. FISHER,
Secy.

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TRANSLATION OF TITLE.

Manuel Jimeno Casarin, Governor ad interim of the Department of the Californias:

[(Seal) Civil Govt. of Upper California.]

Don Victor Castro is provisionally permitted while the usual steps are being to taken, to occupy with horses the Island named "La Yegu" in the Straits of Carquenez.

In consequence let this permission be delivered to the party interested for his security.

Monterey, Oct. 31, 1840.

(Signed) JIMENO.

(Signed) Jose Z. Fernandez, Sec. ad interim

Juan B. Alvarado, regular Constitutional Governor of the Department of the Californias:

Whereas, Don Victor Castro, a Mexican by birth, has petitioned to this Government for the ownership of the Island named "La Yegu" situated in the neighborhood of the Straits of Carquinez in consequence of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being, in charge of this Government,

and in virtue of which the petitioner has repeated again his petition, proving that said Island does not belong to the ownership of any individual, corporation, Pueblo, I have in decree of this day declared as I do by these presents declare Don Victor Castro owner in fee of the said Island in all its extent conformably with the powers conferred on me by the Supreme National Government. In consequence let this be delivered to the party interested, that it may serve him for a title, and for such other purposes as may be convenient.

Given in Monterey Capital of the Department on the second day of the month of May.

(Signed) Juan B. Alvarado

Filed in office Aug. 31st, 1852.

Geo. Fisher, Secy.

Recorded in Ev. B Vol. 17, p. 606.

Geo. Fisher, Secy.

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## DEED FROM CASTRO TO B. SIMMONS & J. B. FRISBEE.

Know all men by these Presents.

That I Victor Castro and Loiza Martinez his wife of Contra Costa in the State of California, for and in consideration of seven thousand five hundred dollars to us paid by John B. Frisbee of Benicia and Bezer Simmons of San Francisco in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said John B. Frisbee and Bezer Simmons their heirs and assigns

all that tract of land lying and being in said California and described as follows viz. Being that tract of land situated near the Straits of Carquinez in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it to the Northward, the said tract of land being known as "Isla de la Yegua" or Mare Island being the same land granted to me the said Castro on the twentieth day of May A. D. 1841 by Juan B. Alvarado Governor of California, the original grant being refered to made a part of this deed and herewith transferred to the said Frisbee and Simmons.

To Have and to Hold the said discribed and conveyed premises with all the appertiances unto the said John B. Frisbee and the said Bezer Simmons their heirs and assigns to them and their own use & behoof forever.

And I the said Victor Castro for myself, my heirs executors and administrators covenant hereby to and with the said John B. Frisbee and the said Bezer Simmons their heirs executors administrators & assigns that I am lawfully seized in fee of the afore granted premises, that they are free from all encumbrances, that I have good right to sell and convey the same to the said John B. Frisbee and Bezer Simmons as aforesaid, and that I will, and my heirs executors and administrators shall warrent and defend the same to the said John B. Frisbie and the said Bezer Simmons their heirs and assigns against the lawful claims and demands of all persons.

And for the consideration aforesaid and for divers other good and valuable considerations I Luiza Martinez wife as aforesaid of the said Victor Castro, I do hereby release and quit claim unto the said John B. Frisbee and Bezer Simmons their heirs and assigns all my right claim or passability of dower or other interest in or out of the afore-discribed premises.

In Witness Whereof we the said Victor Castro and Loisa Martinez his wife hereunto set our hands and seals this twenty eighth day of May A. D. eighteen hundred and fifty.

(Signed) Victor Castro

Executed and delivered in presence of
(the word "grant" being first interlined)
Witnesses to Victor Castro
Von Pruden.
Witness O. Livermore

State of California,
County of San Francisco.

At San Francisco this twenty eighth day of May A. D. eighteen hundred and fifty before me personally appeared Victor Castro known to me as the person executing the foregoing instrument and acknowledged the same to be his free act and deed.

Before me

[Seal] Edw. McGowan J. P.

Filed in office Sept. 10, 1853.

(Signed) Geo. Fisher, Secy.

DEED. FRISBEE TO ASPINWALL.

Know all men by these Presents

That I John B. Frisbee of Benicia in the State of California for and in consideration of five thousand dollars to me paid by William H. Aspinwall of New York the receipt whereof is hereby acknowledged have granted, bargained, sold, released and conveyed, and by these presents do grant, bargain, sell, release and convey unto the said William H. Aspinwall his heirs and assigns one half of all my right, title, interest & Estate in and to that tract of land situated near the Straits of Carquinas in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it on the Northward the said tract of land being known as "Isla de la Yegua" or Mare Island being the same tract of land granted by Juan B. Alvarado Gov. of California to Victor Castro by grant or patent dated the twentieth day of May, A. D. 1841, and by said Castro conveyed to said John B. Frisbie and Bezer Simmons on the twenty eighth day of May A. D. 1850—meaning hereby to convey to said William H. Aspinwall his heirs and assigns one quarter part of the whole of said Island excepting from the whole of said Island the one tenth part and the one sixteenth part of which have heretofore been conveyed by said Frisbee and Simmons to Victor Castro and William P. McArthur with all the privileges and appertenances thereto belonging.

To Have and to Hold the said discribed and conveyed premises to said William H. Aspinwall his heirs and assigns, that I am lawfully seized in fee

of the aforesaid premises, and that they are free from all encumbrances, that I have good right to sell and convey the same to the said William H. Aspinwall as aforesaid and that I will, and my heirs executors and administrators shall warrent and defend the same to the said William H. Aspinwall his heirs and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof the said John B. Frisbee have hereunto set my hand and seal this fifteenth day of August A. D. 1850.

John B. Frisbee.

Signed, Sealed and delivered in presence of
H. M. Halleck
John B. Peachy.

State of California,
County of San Francisco.—ss.

On this 15th day of August A. D. 1850 before me Thomas Tilder a Notary Public duly commissioned for the County aforesaid personally appeared John B. Frisbee to me known to be the person discribed in and who executed the within and foregoing deed and acknowledged that he executed the same of his own free act and deed for the purposes therein set forth.

Given under my hand and seal the day and year last above written.

[Seal] Thomas Tilder
Notary Public

Filed in office Oct. 19, 1854.
(Signed) Geo. Fisher, Secy.

DEED. CASTRO TO BISSELL.

Know all men by these presents that I Victor Castro of the township of Contra Costa and County of Contra Costa in the State of California for and in consideration of the sum of eighteen hundred dollars to me in hand paid by George W. P. Bissell of the City of San Francisco and the State aforesaid at or before the execution and delivery hereof the receipt whereof I do hereby acknowledge, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Geo. W. P. Bissell his heirs and assigns forever all my right, title and interest in and to the one undivided tenth part (1/10th) of the tract of land situated in the State of California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek, the said Creek bounding the said tract to the Northward which said tract of land is called "Isla de la Yegua" or Mare Island, and being the same tract of land originally granted to said Castro by Juan B. Alvarado Gov. of California by grant bearing date the 20th day of May A. D. 1841 and by the said Castro conveyed to John B. Frisbee and Bezer Simmons by deed bearing date the 28th day of May A. D. 1850, and the above one tenth part of said land reconveyed by the said Frisbee & Simmons to the said Castro by deed bearing date the 28th day of May A. D. 1850.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said Geo. W. P. Bissell his heirs and assigns to his and their

own use and behoof forever. And I the said Victor Castro for myself and my heirs, executors and administrators do covenant to and with the said George W. P. Bissell his heirs and assigns that I am lawfully seized in fee of the afore granted premises that they are free from all encumbrances that I have good right to sell and convey the same to the said Geo. W. P. Bissell as aforesaid and that I will and my heirs, executors and administrators shall warrent and defend the same to the said Geo. W. P. Bissell his heirs and assigns against the lawful claims and demands of all persons, and failing so to do I the said Victor Castro for myself and my heirs, executors and administrators do covenant with the said Geo. W. P. Bissell his heirs and assigns that I will and my heirs, executors and administrators shall be held in damages to the said Geo. W. P. Bissell his heirs and assigns in such sum as the said Geo. W. P. Bissell his heirs and assigns may sustain not exceeding the sums mentioned in the consideration of these presents.

In Witness Whereof I the said Victor Castro have hereunto set my hand and seal this twentieth day of July in the year of our Lord one thousand eight hundred and fifty two.

[Seal] Victor Castro

Signed, Sealed and delivered in presence of

Chas. H. H. Cook.

S. W. Moore.

State of California,
City and County of San Francisco.—ss.

On this 20th day of July A. D. 1852 before me a Notary Public in and for the City and County of San Francisco, State aforesaid, personally appeared Don Victor Castro to me well known to be the person described in and who executed the foregoing conveyance and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[Seal] Samuel W. Moore
Notary Public

Filed in office Oct. 20, 1854.
(Signed) Geo. Fisher, Secy.

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## DEED, FRISBIE AND SIMMONS TO V. CASTRO.

Know all men by these presents that we John B. Frisbie of Benicia and Bezer Simmons of San Francisco of California for and in consideration of Ten thousand dollars to me paid by Don Victor Castro of Contra Costa in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said Castro, his heirs and assigns, one undivided tenth part (1/10) of the tract of land situated in

California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek the said Creek bounding the said tract to the northward which said tract of land is called "Isla de la Yegua" or Mare Island and the same tract of land this day conveyed by said Castro to said Frisbie and said Simmons it having been originally decreed to said Castro by grant from Juan B. Alvarado, Gov. of California, dated the 20th day of May, A. D. 1841.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said Victor Castro, his heirs and assigns to his and their own use and behoof forever.

And we the said John B. Frisbie and Bezer Simmons for ourselves and our heirs, executors and administrators, covenant to and with the said Castro his heirs and assigns that we are lawfully seized in fee of the aforegranted premises that they are free from all incumbrances that we have good right to sell and convey the same to the said Castro aforesaid and that we will and our heirs, executors and administrators shall warrant and defend the same to the said Castro, his heirs and assigns against the lawful claims of all persons whatever.

In Witness Whereof I, John B. Frisbie and I, Bezer Simmons acting by my attorney in fact Frederick Billings duly authorized by power of attorney dated December 26 A. D. 1847 recorded in archives of San Francisco Book M of Deeds, page 70, hereto set our hands and affix our seals at San Francisco

this twenty-eighth day of May the year Eighteen hundred and fifty at San Francisco.

[Seal] John B. Frisbee,

[Seal] Bezer Simmons,
by his attorney in fact
Frederick Billings.

Executed and delivered in presence of
Richard C. Peachy,
the word "thousand" interlined, 1st page, fourth written line from top before execution.
Von Pruden.

J. Man'l Allen.

State of California,
County of San Francisco—ss.

On this 21st day of July, A. D. 1852, before me the subscriber a Notary Public in and for said county personally came Frederick Billings known to me to be the person who is the attorney-in-fact of Bezer Simmons executed the within deed and acknowledged to me that he executed the same freely and voluntarily as the act and deed of Bezer Simmons by virtue of a power of attorney for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto subscribed my name and affixed my Notarial Seal the day and year last above written.

[Seal] Royal H. Waller,
Notary Public.

State of California,
County of Sonoma—ss.

On this 28th day of July, A. D. 1852 before me the undersigned County Clerk of Sonoma County personally appeared John B. Frisbie to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal of court affixed at office in City of Sonoma this day and year last above written.

[Seal] John H. Brewster,
Deputy Clerk of Sonoma County.

Filed in Office, Oct. 20, 1854.

(Signed) Geo. Fisher, Secy.

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## DEED. F. BILLINGS, ET AL., ASSIGNEES TO G. W. P. BISSELL.

Know All Men by These Presents, that we, Frederick Billings, James R. Bolton and Henry W. Halleck, all of the City of San Francisco in the State of California, assignees of the real estate and personal property of the late firm of Simmons Hutchinson and Company of the said City of San Francisco, composed of Bezer Simmons and William H. Stowell by virtue of a certain deed duly executed dated the 3d day of September A. D. 1850, recorded in the office of the Recorder of the County of San Francisco in Book No. 1 Deeds of Trust, page 32.

Also assignees of the Real Estate and personal property of the late Bezer Simmons of said San Francisco by virtue of a certain deed duly executed dated the third day of September, A. D. 1852, recorded in the office of the Recorder of the County of San Francisco in Book No. 1, Deeds of Trust, page 29, that we as such assignees and acting under and by virtue of said deeds parties of the first part in consideration of twenty-five hundred dollars to us in hand paid the receipt whereof is hereby acknowledged by George W. P. Bissell of said San Francisco party of the second part have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part his heirs and assigns. All our right, title, interest and claim of in and to the undivided one-half part of Sixty Seven Eightieths (67/80) of Mare Island, so called situated in the Bay of San Pablo which said Island was provisionally granted by Gov. Jimeno on the 31st day of October, A. D. 1840 and afterwards on the 20th day of May, 1841, granted by Governor Alvarado to Victor Castro, and by said Castro conveyed to Frisbie and Simmons on the 28th day of May, 1850 and the interest of said Simmons conveyed to said assignees as aforesaid.

To Have and To Hold the said mentioned premises with all the appurtenances unto the said party of the second part, his heirs and assigns to his and their use and behoof forever.

In Witness Whereof we the parties of the first part hereto set our hands and seals this the first day

of July, the year of our Lord, one thousand eight hundred and fifty-two at San Francisco, aforesaid.

[Seal] Frederick Billings,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] H. W. Halleck,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] James R. Bolton,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

Executed and delivered in presence of
R. H. Waller.

State of California,
County of San Francisco—ss.

On this 16th day of July, A. D. 1852 personally appeared before me the subscriber, a Notary Public in and for said County, Frederick Billings, H. W. Halleck and James R. Bolton, known to me to be the individuals described in and who as the assignees of Bezer Simmons and of Simmons, Hutchinson & Co., and who executed the foregoing conveyance and severally acknowledged to me that they executed the same as such assignees freely & voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed

my name and affixed my Notarial Seal on the day and year last above written.

[Seal] Royal H. Waller,
Notary Public.

Filed in office, Oct. 20, 1854.

(Signed) Geo. Fisher, Secy.

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DEED. SIMMONS TO BILLINGS, ET AL.

This Indenture made this third day of September A. D. One Thousand Eight Hundred and Fifty between Bezer Simmons of San Francisco in the State of California, party of the first part and Frederick Billings, James R. Batton and H. W. Halleck of said city, parties of the second part,

Witnesseth that the said party of the first part in consideration of the sum of One Dollar to him in hand paid by the said parties of the second part the receipt whereof is hereby acknowledged and for the further considerations hereinafter specified hath given granted bargained and sold and by these presents do give, grant, bargain and sell unto them the said parties of the second part all those lands, tenements and hereditaments lying and being in the State of California which are more particularly specified and described in a Schedule hereto annexed and made part hereof, marked Schedule "A". To Have and To Hold unto them the said parties of the second part, their heirs and assigns forever. In trust, nevertheless and to and for the following uses, interests and purposes that is to say that the said

parties of the second part shall take possession of all and singular the said lands & tenements hereby conveyed or intended to be conveyed and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions, and either for cash or upon credit as in his judgment may appear best and most for the interest of the parties concerned and convert the same into money and therefore to execute, acknowledge and deliver good and sufficient deeds and instruments of conveyance necessary to effect a sale and transfer of any and all estates and property hereby conveyed or intended so to be, and by and with the proceeds of such sales the said parties of the second part shall first pay and disburse all the just and usual expenses, costs, charges and commissions of making executing and conveying unto full effect this assignment and the objects thereof and the residue of the proceeds of such sales shall be considered as the net avails or proceeds of the property hereby conveyed.

And first by and with the said net proceeds of the said parties of the second part shall pay and discharge in full all the debts, obligations and demands due or to become due by the party of the first part or in any wise existing against him together with all interest which may be due thereon at the time of payment.

And secondly by and with the rest residue and remainder of said net proceeds if any shall remain after the payment in full of said debts and private

liabilities of the party of the first part, the said parties of the second part shall pay and discharge the partnership debts mentioned in the deed of assignment this day made by the said Bezer Simmons and William H. Stowell to the said parties of the second part and hereby referred to according to the order and arrangement established by the said deed for the payment of the debts therein mentioned or referred to.

And the said party of the first part also assigns and conveys to the said parties of the second part all the goods, chattels, vessels, boats and personal property of any kind mentioned in the said Schedule "A" hereto annexed in which for the uses and purposes herein set forth as those to which the proceeds of the Real Estate above conveyed are to be devoted.

In testimony whereof the party of the first part hath hereunto set his hand and affixed his seal on the day and year first herein written.

Bezer Simmons.

Signed, sealed and delivered in presence of

Richard C. Peachy,

C. Temple Emmett.

State of California,

County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. 1850 personally appeared before me a Notary Public in and for said County Bezer Simmons well known to me to be the party described in and who executed the foregoing instrument and acknowledged that he executed the same freely and

voluntarily and for the purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and official seal the day and year above written.

[Seal] C. Temple Emmett
Notary Public

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SCHEDULE "A"

Schedule of property belonging to Bezer Simmons referred to in his deed of assignment.

The Rancho known as Novato Rancho in Marin County purchased of Jacob P. Luse and Rosalia Vallejo his wife November 24, 1846, save a small portion heretofore conveyed to Benjamin Franklin Simmons with the improvements and my stock thereon.

Seven sixteenths of the Peninsula forming an area of the Bay of San Diego, purchased of—

The following property in the City of San Francisco.

One undivided half of one hundred vara lot numbered eighty eight. Forty varas by fifty varas of fifty vara lot numbered two hundred and eighty five.

Western half of fifty vara lot numbered two hundred and three. Southern half of lot numbered thirty eight fifty vara lot.

About one hundred and forty five lots in Sacramento City the exact number and locality of the same can be ascertained by the original deeds of John A. Sutter to said Simmons dated November 24th A. D. 1849, and recorded in Sacramento and

certain deeds of the lots so conveyed by Sutter given by me to Betheul Phelps, Isaac Y. Matt, Alice Farnham, Franklin N. Billings and Mrs. Ann S. Kegler.

The following property in the City of Benicia viz. The Western half of Lot One (1) in block (5). Lot Six (6) in block Twenty Six. Lot Sixteen (16) in block Forty Seven. Lot Fourteen (14) in Block Forty Eight. Lot Six in block Fifty. Lot Sixteen in Block Fifty One. Lot Sixteen in block Fifty Three.

One undivided fourth part of the ship Magnolia.

A note for two thousand dollars signed by John F. Pope.

Recorded in Co. Recorders office Sept. 4th 1850 10 A. M. in Book No. 1 of deeds of trust p. 29.

John A. McGlynn,
County Recorder
By James O'Grady, Deputy

Filed in office Nov. 7th, 1854.
(Signed) Geo. Fisher, Secy.

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DEED.

SIMMONS & STOWELL TO BILLINGS, ET AL.

This Indenture made this third day of September in the year one thousand eight hundred and fifty between Bezer Simmons and William H. Stowell copartners in trade and business under the name firm and style of Simmons Hutchinson & Co. of the first part and Frederick Billings, James

R. Bolton and H. W. Halleck, of the City of San Francisco parties of the second part,

Witnesseth.

That whereas the said copartnership is jointly indebted in sundry considerable sums of money and by reason of severe losses which have recently attended its business operations has become unable to pay and discharge all its liabilities with punctuality in full, and the said parties of the first part are now desirous of making a fair and just distribution of their property and effects among their creditors.

Now therefore this Indenture Witnesseth that said parties of the first part in consideration of the premises and the sum of one dollar to each of them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged have granted, bargained and sold, released, assigned transferred and set over and by these presents do grant, bargain, sell, release, assign, transfer and set over unto the said parties of the second part and to their heirs and assigns forever all and singular the lands, tenements and hereditaments situate, lying and being within the State of California also all the goods, chattles, steamboats, merchandize, bills, bonds, notes, book accounts, claims, demands, choses in action, books of account, evidences of debt and property of every name, nature and description whatever and wheresoever of the said Bezer Simmons and William H. Stowell the parties of the first part more particularly enumerated and described in the schedule hereto annexed marked "A" and made part of this Indenture.

To Have and to Hold the same and every part and parcel thereof with the appurtenances to the said parties of the second part their heirs and assigns forever.

In trust nevertheless and to and for the following uses, intents and purposes that is to say the said parties of the second part shall take possession of all and singular the lands, tenements and hereditaments and all other property hereby assigned or intended so to be, and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions and either for cash or upon credit as in their judgment may appear best and most for the interest of the parties concerned, and covenant the same unto money, and also to collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands, and choses in action, or so much thereof as may prove collectable and therefore to execute, acknowledge and deliver good and sufficient deeds, bills of sale, releases and all other instruments of conveyance that may be necessary and proper to effect a sale and transfer of any and all the estates, property and effects hereby conveyed or intended so to be and by deed with the proceeds of such sales and collections the said parties of the second part shall first pay and disburse all the just, reasonable and usual expenses, costs, charges and commissions of making and conveying into effect this assignment and the objects thereof and the residue of the proceeds of such sales and collections shall be considered as the nett avails or

proceeds of the property and effects hereby assigned.

And first by and with the said proceeds the said parties of the second part shall pay and discharge in full the following sums of money to the persons to whom they are respectively due, that is to say George H. Howard three thousand dollars ($3000) to Flint Peabody & Co. three thousand dollars ($3000) to Wells & Co. two thousand dollars ($2000) wtih legal interest from the date of this assignment.

The said debts are mentioned in Schedule "B".

And secondly by and with the residue and remainder of said nett proceeds if any shall remain after the payment in full of the debts and liabilities mentioned in Schedule "B" the said parties of the second part shall pay and discharge all sums of money due upon deposit made with the firm of Simmons Hutchinson & Co. when said firm was composed of Bezer Simmons, William H. Stowell, John F. Pope and Titus Hutchinson as well as when composed of the said parties of the first part provided that said deposits were made without arrangement between the depositors and the said firm of Simmons Hutchinson & Co. that the money or gold dust deposited should bear interest, and also whatever sums of money shall be due or become due to the owner of the Steamer Gold Hunter. The above mentioned debts which are set forth in Schedule "C" shall be paid in full if such remainder shall prove sufficient for that purchase and if insufficient then the parties of the second part shall apply such remainder to the payment and liquidation of said debts and demands mentioned in Schedule "C" pro

rata share and share alike according to their respective amounts as far as such remainder will *satnd* for that purpose and in the foregoing class of creditors shall be included the firm of G. S. Robbins & Son of the City of New York Bankers the amounts of indebtedness to whom is stated in said Schedule "C".

And thirdly by and with the rest, residue and remainder of said nett proceeds if any shall remain, after paying & discharging the debts and demands aforesaid the said parties of the second part shall pay & discharge all the other copartnership debts demands and liabilities whatsoever now existing whether due or hereafter to become due against the firm of Simmons Hutchinson & Co. when composed of the said Bezer Simmons, Titus Hutchinson, John F. Pope and William H. Stowell partners as well as when the said firm was composed of the parties of the first part partners therein provided such remainder shall prove sufficient for that purpose and if insufficient then said parties of the second part shall apply such remainder to the payment and liquidation of such debts & demands pro rata share and share alike according to their respective amounts as far as such remainder will extend for that purpose.

And lastly the said parties of the second part shall return the surplus if any remain after paying the debts and demands aforesaid to the said parties of the first part their executors, administrators or assigns and for the better execution of these pres-

ents and of the several trusts hereby reposed the said parties of the first part do hereby make, nominate, constitute and appoint the said Frederick Billings their and each of their true and lawful attorney irrevocable with power of substitution and revocation with full power and authority in the name of the said parties of the first part and their and each of their legal representatives or otherwise to do, transact and perform all acts, deeds, matters and things in the full execution of these powers.

And the said parties of the first part for themselves and their and each of their heirs, executors and administrators covenant and agree to and with the said parties of the second part that they will when requested make or cause to be made such further assignments, deeds and conveyances as shall be necessary to carry into full and complete effect the intentions of the parties to these presents.

It is understood that this deed of assignment is a deed of trust for the lawful benefit of the creditors of the present firm of Simmons Hutchinson & Co. composed of the parties of the first part and also the creditors of the firm of Simmons Hutchinson & Co. as it was formaly constituted when Titus Hutchinson and John F. Pope were also partners aside from the preference hereinbefore given to certain creditors, the creditors of the two firms doing business under the same name being treated alike.

In testimony whereof the parties to the first part have hereunto set their hands and affixed their seals

on this third day of September A. D. one thousand eight hundred and fifty.

Bezer Simmons.
W. H. Stowell.

Signed, Sealed and delivered in the presence of the words "creditors of the" having been interlined on the last line of the fifth page before the execution hereof.

Richard C. Peachy
C. Temple Emmett.

State of California,
County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. eighteen hundred and fifty personally appeared before me a Notary Public within and for said County Bezer Simmons and William H. Stowell well known to me to be the parties described in and who executed the foregoing instrument, and each acknowledged that he executed the same freely and voluntarily and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal affixed the day and year above written.

[Seal] C. Temple Emmett
Notary Public

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SCHEDULE "A"

Property belonging to Simmons Hutchinson and Company being Schedule "A" referred to in the foregoing deed of assignment.

Beach and Water Lot No. One hundred and twenty one with store thereon situated on Clay

Street between Montgomery and Sansome, mortgaged to Wells & Co. to secure the payment of a note for fifteen thousand dollars.

Three Fifteenths (3/15) of Steamer Gold Hunter mortgaged to Wells & Co. to secure the payment of a note for Twenty five thousand dollars.

Ten twenty-fourths (10/24) of Steamer McKim mortgaged to Wells & Co. to secure the payment of a note for Fifteen thousand dollars.

One undivided half of twenty lots bought of Dr. B. F. Edwards and situated on Chestnut, Jones and Greenwich Streets on the North Beach.

Lot on Front Street, Sacramento City, between "M and N" twenty-five feet front and one hundred and sixty feet deep to an ally with the store thereon.

One undivided half of Sixty-seven Eightieths (67/80) of Mare Island in San Pablo Bay.

Lot on M Street in Vernon with store thereon, said lot being twenty five feet front and one hundred twenty-five deep.

About Eight hundred lots in Vernon and an individual interest in the lands adjoining the town.

One undivided sixth part of the Rancho known as Llano Seco on the Sacramento River.

One half of Steamboat building by Watters Butcher & Co. at Rincon Point.

One Eighteenth of Steamer Hartford and one eighteenth of her dividens since July 1st.

Three Eighths of Steamer Bute.

One third of Bark Whitace.

One fourth of Bark Dinan.

Storeship Florence with Scows, Launches and Boats.

About two hundred thousand feet of lumber on the North Beach.

About one hundred thousand feet of lumber at Alviso.

About thirty thousand feet of lumber at Sacramento City.

About Sixty thousand shingles at do, do.

Counting Room furniture consisting of Desks, Safes, Gold Scales, Stoves, etc.

Lot in Block fifteen in Town of Benicia.

A large amount of Book accounts and notes due the said firm of Simmons Hutchinson & Co., the amount of which will be particularly ascertained by reference to the backs of said notes.

Small amount of merchandize in store.

Recorded in Co. Recorder's office, Sept. 4, 1850 at 10 a. m. in Book No. 1 Deeds of Trust, on page 32.

John A. McGlynn,
County Recorder.
By Jas. O'Grady, Deputy.

Filed in office, Nov. 7, 1854.
(Signed) Geo. Fisher, Secy.

OPINION OF THE BOARD DELIVERED BY COMMISSIONER S. B. FARWELL.

GEORGE W. BISSELL, ET AL.,

vs.

THE UNITED STATES.

For a Place called Mare Island in the Bay of San Francisco in the County of Sonoma.

The claimants in this case ask confirmation of their title which they derive from Victor Castro, by virtue of a grant issued to the said Castro, on the 20th day of May, 1841, by Governor Juan B. Alvarado, and have offered in evidence in support of their claim the original grant to the said Castro, and also various deeds of conveyance from different persons through whom the title has passed from the said Castro showing a correct chain of title from the said Castro of his interest to the present claimant.

Strong suspicion has been raised by the testimony as to the genuineness of the grant.

It is written on the back of the same half sheet that contains a provisional grant to the same party executed by Manuel Jimeno, acting as Governor on the 31st day of October, 1840. And it would seem from inspection of the document that it would be highly impossible that any person whose attention was drawn to the inspection of the document and examine the contents of the first and provisional grant without noticing the contents of the second page, as it is written in quite a heavy hand and shows quite plainly through the paper. Mr. Misner, a witness on the part of the government, testifies that a docu-

ment similar to the provisional grant now under consideration and in his opinion the same one, was handed to him sometime in the year 1850 to be translated with the view of getting advice as to the legal effect, and he says that he translated that part of the document, and did not observe anything that now appears on the other side of the paper.

Stephen Cooper swears that sometime in 1850 he saw a similar paper, which was shown to him by Mr. Frisbie, one of the then claimants of the Island in order to show witness that he, Frisbie, had a title to the Island, and he said to Mr. Frisbie, "It was strange that this writing appears here now, and it was not here in the winter of 1847 and 1848." And says that he does not know whether he formed his impressions that the grant was attached after 1848, by former inspection of the documents or from hearsay.

Mr. McDonald's testimony is similar to that of Mr. Cooper.

There is no doubt but that the body of the grant on the second page is in the hand writing of Governor Alvarado, and that his signature thereto is genuine.

The only question is as to the time the same was made and executed.

Governor Alvarado as a witness in the case, and swears positively that he wrote the grant and signed it himself at the time and place that it purports to have been done.

The testimony on the part of the government is of a negative nature, while that of Governor Alva-

o is positive and of course under the rule of law
onstructing testimony when the witness in other
ects stands unimpeached he must receive greater
ght when he affirms facts of a positive nature,
in which he could not be mistaken.

the present case Governor Alvarado could not
istaken as to the facts that he has sworn to. He
r did execute the grant officially as Governor
he time it purports to have been done, or he
nitted a forgery in the subsequent execution
eof and perjury in swearing to the time and
e of its execution, for the case presents a state
cts in which Governor Alvarado could not well
istaken, and, from the facts before us we do
eel warranted in discrediting entirely the tes-
ny of Governor Alvarado, and if any force is
to it, it must be for the full extent of his state-
s, and in that event, this claim must be con-
d and a decree herein will be entered accord-

ed in office, May 8, 1855.

(Signed) Geo. Fisher, Secy.

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RGE W. BISSEL, ET AL.,

vs.

UNITED STATES.

DECREE OF CONFIRMATION.

this case after having the proofs and allega-
it is adjudged by the Commission that the
of the said petitioners is valid, and it is there-

fore deemed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

R. Aug Thompson,
S. B. Farwell,
Commissioners.

Filed in office, May 8, 1855.
(Signed) Geo. Fisher, Secy.

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ORDER.

And it appearing to the satisfaction of this Board that the land hereby adjudicated is situated in the Northern District of California, it is hereby ordered that two transcripts of the proceedings and of the decisions in this case, and of the papers and evidence upon which the same are founded be made out and duly certified by the Secretary, one of which transcripts shall be filed with the clerk of the United States District Court for the Northern District of California and the other be transmitted to the Attorney General of the United States.

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
in the State of California

I, George Fisher, Secretary to the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, do hereby certify the foregoing sixty-nine pages, numbered

om 1 to 69, both inclusive, to contain a true, cor-
ct and full Transcript of the Record of the Pro-
edings and of the Decision of the said Board, of
e Documentary Evidence and of the Testimony of
e Witnesses, upon which the same is founded, on
e in this Office, in Case No. 307 on the Docket of
e said Board, wherein G. W. P. Bissel & Wil-
m H. Aspinwall are the Claimants against the
nited States, for the place known by the name of
'sla de Yegua" or Mare Island.

In Testimony Whereof, I hereunto set my hand
d affix my private Seal (not having a Seal of
fice) at San Francisco, California, this twentieth
y of October A. D. 1855, and of the Independence
the United States of America the eighty.

[Seal] GEO. FISHER, Secy.

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Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
the State of California

San Francisco, Oct. 20th, 1855.

A. Monroe Esq.
erk of the U. S. District Court for the Northern
District of California.

;

herewith transmit you, pursuant to the require-
nts of the Act of Congress, approved August 31st,
2, a Transcript of the Record of the Proceed-
s and of the Decision of this Board, of the Docu-
ntary Evidence and of the Testimony of the
nesses upon which the same is founded, in Case

No. 307 on the Docket of the said Board, wherein G. W. P. Bissel & William H. Aspinwall are the Claimants against the United States, for the place known by the name of "Ysla de Yegua" or "Mare Island," and request your receipt for the same.

I am, Respectfully,

Your Ob't Servant,

Geo. Fisher, (Sec.)

Office of the Attorney General of the United States,
Washington, 3 December, 1855.

307 "Ysla de la Yegua," or "Mare Island" G. W. P. Bissell & William H. Aspinwall Claimants.

You will please take notice that in the above case, decided by the Commissioners to ascertain and settle private land claims in the State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 20 day of November, 1855, the appeal in the district court of the United States for the Northern district of California will be prosecuted by the United States.

C. Anthony
Attorney General.

[Endorsed]: Filed Febry. 1, 1856.

No. 311

In the United States District Court for the Northern District of California.

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Transcript No. 307
Mare Island

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL & WM. H. ASPINWALL,

Appellees.

George W. P. Bissell and William H. Aspinwall, appellees, appear by their attorneys, and for answer to the petition of the United States filed herein, say:

That their title to the tract of land called "Ysla de la Yegua" (Mare Island), as set forth and described in their petition to the Board of Commissioners and in the documentary and other evidence filed in this case is a good and valid title; that the land claimed is situate in the Northern Dist. of California and within the jurisdiction of this court.

And they pray this Honorable court to affirm the decision of the Board of Commissioners, and to decree their title to be valid.

Halleck, Peachy & Billings
Attys. for Appellees.

[Endorsed]: Filed Feby. 18, '56.

To the Honorable District Court of the United States in and for the Northern District of California.

No. 311

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and
WILLIAM H. ASPINWALL.

The Petition of the United States, by their Attorney represents: that this cause is an application for a review of the decision of the Board of Commissioners whereby the claim of the said Appellees was confirmed as appears by reference to the records in the case: That a transcript of the said Records was filed in this Court on the 1st day of May, 1855; that a notice of appeal was filed on the 1st day of Aug. 1855 and that the land claimed lies in the said District. That the said claim is invalid.

Wherefore Appellants pray that the said decision of the Board be reversed & that this court decree the said title to be invalid.

Respectfully &c
S. W. Inze
U. S. Dist. Atty.

[Endorsed]: Filed Feby. 18th, '56.

No. 311.

In the United States District Court in and for the Northern District of California.

Transcript No. 307. Mare Island.

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,

Appellees.

Stated Term of the Court, March 2d, 1857. Hon. Ogden Hoffman, Judge.

On appeal from the final decision of the Board of Commissioners to ascertain and settle Private Land claims in the State of California.

DECREE.

This cause came on to be heard at a stated term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California under the Act of Congress approved on the 3d of March A. D. 1851, rejecting the claim.

Upon the Transcript of the proceedings, and decision of the said Board of Commissioners, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said Transcript has been duly filed according to law and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same

is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim and that the said claim be and the same is hereby confirmed to the said "Isla de la Yegua" or "Mare Island" with its natural boundaries.

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At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room, in the City of San Francisco, on ..... the .....day of ..... in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable OGDEN HOFFMAN, District Judge.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

The Attorney General of the United States having given notice that appeal in this case will not be prosecuted, and a stipulation to that effect having been entered into by the District Attorney:

On motion of the District Attorney it is Ordered, Adjudged and Decreed that the appeal heretofore granted in this case to the Supreme Court of the United States be vacated, and that claimants have

leave to proceed under the decree of this Court heretofore rendered in their favor, as under Final Decree.

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At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room, in the City of San Francisco, on Wednesday the first day of April in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable OGDEN HOFFMAN, District Judge.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In this case on application of the U. S. Attorney made in open Court, it is Ordered by the Court, that an appeal in behalf of the United States from the final decision of this Court rendered at the present term, be and the same is hereby granted; and that a certified transcript of the pleadings, evidence, depositions and proceedings in the said cause be sent to the Supreme Court without delay.

[Endorsed]: Filed April 1st, 1857.

In the District Court of the United States for the Northern District of Cala.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In pursuance of notice from the Attorney General of the United States, it is hereby stipulated and agreed that the appeal to the Supreme Court of the United States heretofore granted in this case, be vacated, and that claimants have leave to proceed under the decree of this Court heretofore rendered in their favor, as under Final Decree.

San Francisco, .....1857.

Halleck, Peachy & Billings,
Attys. for Appellees.

In the Southern Division of the United States District Court for the Northern District of California.

No. 311—Transcript No. 307. Mare Island.

UNITED STATES OF AMERICA,

Appellant,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,

Appellees.

On appeal from the final decision of the Board of Land Commissioners to ascertain and settle private land claims in the State of California under the Act of Congress, approved on the 3rd day of March, 1851.

DECREE NUNC PRO TUNC.

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in the State of California, under the Act of Congress, approved the third of March, A. D. 1851, upon the transcript of the proceedings and the decision of said Board of Commissioners confirming the claim of the Appellees and the predecessors in interest, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said transcript has been duly filed according to law, and Counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed,

that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed, that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the said "Isla De LaYegua" or "Mare Island" with its natural boundaries.

IT FURTHER APPEARING by the minutes, records and proceedings of this court, that on March 2nd, 1857, the above entitled Court made its Order duly entered in the minutes of said Court, directing the entry of a Decree of Confirmation in the above entitled matter by consent of the United States District Attorney, and that by accident, oversight, inadvertence or excusable neglect, no decree in conformity with said Order and Judgment has as yet ever been entered herein, and that the files of the Clerk of this Court contain an unsigned decree confirming the said decision of the said Board of Land Commissioners, and that this case is still pending and undecided herein;

AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.

OW, THEREFORE, on motion of Geo. J. Hat-
, Esq., United States Attorney for the Northern
rict of California, Attorney for said Appellant,
e on the 15th day of April, 1930, that a decree
ntered Nunc Pro tunc in conformity with the
Order, and the Court now being fully advised
he premises, the said Motion is hereby granted
it is hereby ordered that this decree of confir-
on in said cause confirming in all particulars
decision of said Board of Land Commissioners
ntered Nunc Pro Tunc, as of the 2nd day of
ch, in the year 1857.

ated in open Court this 15th day of April, 1930.

A. F. ST. SURE,
United States District Judge.

Endorsed]: Filed and entered April 15, 1930,
pro tunc as of March 2, 1857.
ntered in Vol. 25 Judg. and Decrees at page

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is conveyance made and entered into this
ty-fifth day of October in the year of our Lord
housand eight hundred and forty-nine by Vic-
Castro, by Mariano G. Vallejo, his attorney,
y of the first part and Bezer Simons and John
risbie, witnesseth that the said Victor Castro
nd in consideration of the sum of seven thou-
five hundred dollars the receipt whereof is
y acknowledged hath bargained and by these
nts doth grant, bargain and sell unto the said

Bezer Simons and John B. Frisbie all that tract and parcel of land known as Mare Island situate in San Pablo Bay at the mouth of Napa Creek.

To have and to hold the above released premises the said Bezer Simons and John B. Frisbie, their heirs and assigns to their use and behoof forever.

In Witness Whereof the said Victor Castro by Mariano G. Vallejo, his attorney, as aforesaid hath hereunto set his hand and seal this twenty-fifth day of October in the year of our Lord one thousand eight hundred and forty-nine.

[Seal] Victor Castro,

[Seal] By Mariano G. Vallejo.

Sealed and delivered in presence of Thos. G. Peachy, Robert R. Pierpont.

District of Sonoma,
Territory of California.

Personally appeared before me Prefect for the District of Sonoma the above named M. G. Vallejo who acknowledged the above signature to be his deed that the above deed was executed for the purposes therein mentioned by Victor Castro by power of attorney granted to said Vallejo.

Witness my hand and seal this 30th day of October, 1849.

[L. S.] Chas. P. Wilkins,
Prefect for Sonoma District.

Recorded Nov. 3d, 1949.

State of California,
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of record in my office in Book A, page 442 of Solano County Records.

Witness my hand and seal this the 9th day of April, A. D. 1859.

[Seal] Wm. J. Hooton,
County Recorder of said county.
By Perry Williams,
Dep. Recorder.

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DEED

John B. Frisbie to Geo. W. P. Bissell

This Indenture made and executed this sixteenth day of July Eighteen hundred and fifty-two by and between John B. Frisbie of the City and County of Sonoma and State of California of the first part, and G. W. P. Bissell of the City and County of San Francisco and State aforesaid of the second part, WITNESSETH That the said party of the first part for and in consideration of the sum of four thousand dollars lawful money of the United States of America to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part his heirs, executors, administrators and assigns all the right, title and interest of the said party of the first part of, in and

to that certain piece of property situate in the County of Sonoma and State of California, known as Mare Island, the said interest being one undivided fourth of said Island, less one tenth and one sixteenth of the whole. To Have and to Hold all and singular the above described premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever. In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[Seal] John B. Frisbie.

Sealed and delivered in the presence of
M. J. Vallejo.
Martin E. Cooke

State of California
County of Sonoma—ss.

On this sixteenth day of July Eighteen hundred and fifty-two personally appearing before me the within named John B. Frisbie to me known to be the person named and described in the within Instrument and who executed the same, and acknowledged that he had executed the same voluntarily as his own free act and deed for the uses and purposes therein mentioned. In Witness Whereof I have hereunto set my hand and private seal having as yet no official seal on the day and year above written.

[Seal] Martin E. Cooke
Notary Public.

[Endorsed]: Filed for Record on this the 19th day of July A. D. 1852, at 8 o'clock A. M. I Hendley

Recorder of Sonoma County By I. A. Brewster, Deputy.
and Recorded in Book "H" of Records of Land Titles in Sonoma County on pp. 148 and 149: on this July 19, A. D. 1852.

I. Hendley, Recorder,
By I. A. Brewster, Deputy.

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## COPY OF DEED

### Wm. H. Aspinwall, et al., to the United States of America

To All Whom these Presents Shall Come

George W. P. Bissell of the City of San Francisco in California, William H. Aspinwall of the City of New York in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland Send Greeting, WHEREAS the said parties as tenants in common are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a Navy Yard for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interest and proportions of the said owners respectively in the said Island are as follows that is to say of the said George W. P. Bissell fifty eight eightieths parts and one fourth of an eightieth part (the whole being divided into equal eightieth parts) the said William H. Aspinwall sixteen and three-fourths eightieths parts and the said Mary S. McArthur as sole devisee of William P. McArthur deceased of the remaining five eigh-

tieth parts; and they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed paid to them severally and respectively according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now These Presents Witness that the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of eighty-three thousand four hundred and ninety one dollars to them paid in proportion to their said interests respectively on behalf of the United States of America the receipt of which is hereby acknowledged have granted, bargained and sold, released and quit claimed and by these presents do grant, bargain, sell, release and quit claim unto the United States all that tract of land and island called and known as Mare Island in the Bay of San Pablo as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard then including all the tule or low land and marsh belonging to the same or which has ever been separated or claimed to belong to the same and all the waters, harbours, bays, creeks and other waters privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed) with the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever with

the mutual agreement that the said Grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek the location of which ferry on the shore of the mainland shall be where the Grantors, their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officers at the time representing the Navy department at San Francisco for the landing of which ferry on the said Island to be selected and located by the said grantors, their heirs and assigns with such assent and approval as last aforesaid. However ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States. That the said ferry and landing place, shall at all times for the purpose of police and the segregation of persons and things in the Navy Yard be subject to such orders as the secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island and also that no building of any kind shall be erected on the landing place without such consent as aforesaid and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States in reference to the said public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for

the purpose of such landing place and the ferry privilege shall apply to such new landing place and all other terms hereof in relation thereto and so on from time to time as changes in this respect may be found necessary on the part of the United States and on every such change it shall be lawful for said grantors, their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors, their heirs and assigns to conform to such removal with all convenient speed.

And the said grantors for themselves according to their several interests aforesaid and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the Law for the more perfect assurance unto them of the promises hereby purporting to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands

and seals the fourth day of January, one thousand eight hundred and fifty three.

G. W. P. Bissell [L.S.]
& Wm. H. Aspinwall [L.S.]
Atty
Wm. H. Aspinwall [L.S.]
Mary S. McArthur [L.S.]

Sealed and delivered in the presence of
As to the signature of

G. W. Bissell — Wm. Macrea
W. H. Aspinwall — I. C. Lanum
Atty. and — J. D. Pratt
William H. Aspinwall — Jno. D. Young
As to Mary S. Arthur

State of New York
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California to take the acknowledgments and proof of deeds and other instruments of writing under seal to be used or recorded in same State of California and to administer oaths and affirmations, do hereby certify that on the day of the date hereof, before me personally, came William H. Aspinwall in his individual capacity and as the attorney in fact of George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell one of the parties

therein described by virtue of a power of attorney duly executed *by the said* for the purposes therein mentioned.

And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the same deed.

Given under my hand and official Seal the fourth day of January in the year of our Lord one thousand eight hundred and fifty three.

[L.S.] Joseph C. Laurence
Commissioner of the State of California in and for the State of New York, 68 Water Street, New York.

State of Maryland
Baltimore, City & County—ss.

On this fifth day of January A. D. 1853 before me, Jabez D. Pratt, a Commissioner appointed by the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds &c personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed & sealed the same before me acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day & year last aforesaid

Jabez D. Pratt
Commr. of California.

State of California
County of Solano

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853 at 9 o'clock A. M.

Jos. P. Vaughn
County Recorder.

State of California
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of Record in my office in Book H, pages 10, 11, 12 & 13 of Solano County Records.

Witness my hand and seal of the County Recorder's office of said County this the 9th day of April A. D. 1857.

[Seal] William L. Hooton
County Recorder of said County.
By Perry Williams
Dep. Recorder.

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Mr. PECKHAM: We offer a certified copy of the Castro grant, recorded in Book "H" of Deeds, Page 161. (Record is in Spanish)

Mr. BURKE: I would like to have that noted in the Record.

(The Castro grant and translation are offered in evidence as "Plaintiff's Exhibit D".)

Mr. PECKHAM: We offer the Bissell and Aspinwall deeds, with the acompanying papers, certi-

fied and recorded in the Office of the County Recorder of Solano County. The accompanying papers are all of the documents that were recorded by the Secretary of the Navy at the time of the recording of the Bissell and Aspinwall deeds.

(The Bissell and Aspinwall deeds and accompanying papers are offered in evidence as "Plaintiff's Exhibit E".)

PLAINTIFF'S EXHIBIT E.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

TO ALL WHOM THESE PRESENTS SHALL COME: George W. P. Bissell of the City of San Francisco, in California, William H. Aspinwall of the City of New York, in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland send Greeting.

Whereas the said parties as tenants in common are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a Navy Yard and for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interests and proportions of the said owners respectively in the said Island are as follows: that is to say:—Of the said George W. P. Bissell fifty eight eightieth parts and one fourth of an eightieth

part (the whole being divided into equal eightieth parts) the said William H. Aspinwall, sixteen and three fourths eightieth parts, and the said Mary S. McArthur as sole devisee of William P. McArthur, deceased of the remaining five eightieth parts; And they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed, paid to them severally and respectively according to their several and respective interests aforesaid, with the exception hereinafter expressed. NOW THESE PRESENTS WITNESS: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of Eighty-three thousand four hundred and ninety one dollars to them paid, in proportion to their said interests respectively, on behalf of the United States of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released and quitclaimed and by these presents do grant, bargain, sell, release and quitclaim unto the United States, all that tract of land and Island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging

(excepting only as hereinafter expressed) with the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to hold the same to the United States of America, and their assigns forever, with the mutual agreements that the said grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officer or officers at the time representing the Navy Department at San Francisco, for the landing of which Ferry on the said Island, a piece of land on the margin and shore of said Island, to be selected and located by the said Grantors their heirs and assigns with such assent and approval as last aforesaid, however ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States, That the said Ferry and landing place, shall at all times for the purpose of police, and the regulation of persons and things in the Navy Yard *by* subject to such orders as the Secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island; And also that no building of any kind shall be erected on the landing

place without such consent as aforesaid; and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States in reference to the said Public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for the purpose of such landing place, the landing of the said Ferry shall be removed to such new landing place and the Ferry privilege shall apply to such new landing place and all other terms hereof in relation thereto, and so on from time to time as changes in this respect may be found necessary on part of the United States and on every such change it shall be lawful for said grantors their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the Ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors their heirs and assigns to conform to such removal with all convenient speed. And the said grantors for themselves according to their several interests aforesaid, and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the law for the more perfect assurance unto them of the premises hereby purport-

ing to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof, the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of Attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty three.

G. W. P. Bissell [L.S.]
By Wm. H. Aspinwall, Atty. [L.S.]
Wm. H. Aspinwall [L.S.]
Mary S. McArthur [L.S.]

Signed and Delivered in the Presence of:

As to the signatures of G. W. Bissell, W. H. Aspinwall, Atty., and William H. Aspinwall.

Wm. Macrea
J. C. Laurence.

J. D. Pratt—Jno. J. Young, as to Mary S. *Arthur.*

State of New York,
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California, to take the acknowledgments and proof of deeds and other instruments of writing under seal to be *used* or recorded in same State of California and to administer oaths and affirmations Do Hereby Certify that on the day of the date hereof before me

personally came William H. Aspinwall in his individual capacity and as the Attorney in fact of George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he has executed the same in his individual capacity and as the Attorney in fact of George W. P. Bissell one of the parties therein described by virtue of a power of Attorney duly executed by the said George W. P. Bissell for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January in the year of Our Lord one thousand eight hundred and fifty-three.

[Seal] Joseph C. Laurence,
Commissioner of the State of California in and for the State of New York, 68 Water Street, New York.

State of Maryland,
Baltimore City & County—ss.

On this fifth day of January, A. D. 1853, before me, Jabez D. Pratt, a Commissioner appointed by the Governor of the State of California, in and for the State of Maryland, to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed and sealed the same before me ac-

knowlelged the same to be her free act and deed and desires the same might be recorded as such.

In Witnss Whereof, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[Seal] Jabez D. Pratt,
Comr for California.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April, A. D. 1853 at 9 o'clock A. M.

Jos P. Vaughn, County Recorder.

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KNOW ALL MEN BY THESE PRESENTS: that we William H. Aspinwall and Samuel W. Comstock of the City of New York, Merchants, are held and firmly bound unto the United States of America in the penal sum of Two Hundred Thousand Dollars lawful money of the United States, to be paid to the said United States or the Secretary of the Navy thereof, For which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

In Testimony Whereof, we have hereunto signed our names and affixed our seals in the City of New York on this twenty eighth day of February in the year Eighteen hundred and fifty three.

Whereas the said William H. Aspinwall in his own right and as Attorney of George W. P. Bissell

of California, and also as Attorney for Mary S. McArthur did on the fifteenth day of December eighteen hundred & fifty two enter into a Contract with the Hon. John P. Kennedy, Secretary of the Navy, in conformity with the terms and stipulations relating thereto, expressed in a letter of the said Secretary of the Navy dated on the tenth day of December Eighteen hundred and fifty two, which letter and the assent of the said William H. Aspinwall are on the files of the Navy Department, whereby the said William H. Aspinwall acting for himself and the other parties hereinabove referred to did covenant and agree to sell to the United States the tract of land in California, in the Bay of San Pablo, known by the name of Mare Island, and did thereby bind himself and all other parties interested in the ownership of the same to convey to the United States by a good and sufficient deed or Deeds, the entire and absolute fee simple Estate in the said tract of land known as Mare Island aforesaid, which conveyance it was stipulated was to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall, as a full consideration for said purchase whatever portion of the appropriation of one hundred thousand dollars appropriated by Act of Congress of the 31st August 1852 should remain as the unexpended balance thereof after all the expenses of the Commission for the selection of a site for a Navy Yard in California and the performance of the duties assigned to the Board of Officers, charged with that selection should have

been fully paid. And which said Contract or agreement contains also other stipulations which the Parties thereto were to observe, all of which will more fully appear by reference thereto the same being appended to this Bond for the interpretation of the same and as a part thereof.

And Whereas the said William H. Aspinwall acting in his own right, and as attorney for the said George W. P. Bissell, has together with Mary S. McArthur executed a Deed to the United States in pursuance of the above Contract and for the conveyance of the said tract called Mare Island and its appurtenances with covenants for further assurance of the same should be necessary, which deed is dated on the fourth day of January Eighteen hundred and fifty three, and is deposited with the Secretary of the Navy.

Now the condition of the above written obligation is such that if the said William H. Aspinwall shall well and truly observe, perform and fulfil the obligations of the said Contract hereinabove referred to and more particularly set forth in the copy thereof, hereto appended and shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said William H. Aspinwall, and shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic

which may within two years from the date hereof, be made and thereafter be successfully established against the title proposed to be conveyed by said William H. Aspinwall and those with and through whom he claims to hold the same by which the full and perfect title of the United States as derived by the conveyance of the said William H. Aspinwall and the parties represented by him, may be in anywise impaired, diminished or destroyed and if the said William H. Aspinwall and those whom he represents so far as he and they are bound thereto by the covenants of the deed of conveyance herein above referred to and the contract hereinbefore recited, procure and executed such further conveyance by Deed or Deeds as may become necessary for the complete establishment and security of the title in the United States, in conformity with the true interest of said contract; And also if the said George W. P. Bissell's Power of Attorney to the said William H. Aspinwall shall have been revoked by any matter of fact or of law or if the said George W. P. Bissell shall prior to the date when the Deed herein above referred to or any substitute for the said Deed, shall be sent to California and be received there to be registered and recorded the same to be sent forward without unreasonable delay have disposed of or encumbered the said lands so that the title to the United States therein may be impaired, in which event if all such incumbrances or acts tending to impair the said title be not forthwith removed or defeated and by reason of such failure to remove or defeat them, the Secretary of

the Navy, should think fit to reconvey or relinquish the said land to the Grantors named in the deed herein above mentioned their heirs and assigns, and the said William H. Aspinwall his heirs, executors, administrators or assigns in that case should refund and repay to the United States the amount which shall have been paid to him as the consideration of the said purchase with interest at the rate of six per cent on the same, then upon this and all other contingencies hereinbefore expressed this obligation shall become void but otherwise it shall stand and remain in full force and virtue according to its tenor and effect.

Wm. H. Aspinwall (L.S.)
Saml W. Comstock (L.S.)

Signed, Sealed and Delivered in presence of:
Wm. Macrea.

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Navy Department
December 10th, 1852.

Sir:

I have received Mr. William H. Aspinwalls letter of the 4th inst and yours of the 7th. Mr. Aspinwall being as you inform me fully authorized to act in behalf of all the owners of Mare Island in California, for the sale of that property to the United States and to make an absolute engagement & contract for the sale thereof in their names, which shall be binding upon all parties having any interest in this property, I take this occasion to say to you that I am now ready in pursuance of the

authority given to me by the 3rd Section of the Act of Congress of August 31st, 1852, entitled an act making appropriations for the Naval Service for the year ending the 30th of June 1853, CIX of the United States at large, 1st Sess. 32 Con; to conclude a contract for the purchase of Mare Island as recently surveyed & reported by a Board of Officers sent to California for the purpose of selecting a site for a Navy Yard, which Board have returned and made their report to this Department. I understand the basis of a contract proposed by Mr. Aspinwall & by yourself with his authority to be as follows: That Mr. Aspinwall acting for himself and all other parties interested in the ownership of Mare Island or claiming any interest in the same, proposes in their behalf & binds them and himself to convey to the United States by a good and sufficient deed or deeds, the entire and absolute fee simple estate in that tract of land known as Mare Island in California including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same giving a quitclaim and full transfer of all the interest of the proprietors in the same and all privileges, rights or claims to the waters, harbors, and creeks supposed or claimed to belong to the said tract known as Mare Island.

That this conveyance is to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall as a full consideration for the purchase, whatever, portion of the appropriation of One Hundred Thou-

sand Dollars appropriated by the Act of Congress herein above referred to may remain as the unexpended balance of that appropriation, after all the expenses of the Commission for the selection of the site for the Navy Yard and the performance of the duties assigned to the Board of Officers charged with the selection shall have been fully paid. That this sum shall be ascertained as soon as practicable by auditing the accounts of expenses of the Commission and deducting the amount at which they may be stated from the whole amount of the appropriation and upon receiving the proper deed or deeds for a full & perfect conveyance of the title to the tract of land above mentioned, with all its appurtenances and privileges made and executed to the satisfaction of the Department, then the amount ascertained as above to be paid to the said Wm. H. Aspinwall.

It is further proposed as a part of this agreement on behalf of the owners that the United States shall permit a ferry to be established with the shore on the opposite side of the Straits of Carquinez, with a suitable reservation of five hundred feet square on Mare Island for a landing which proposition is modified at my instance to be received as follows:

That the United States shall agee to allow a convenient ferry for intercourse with the opposite shore with such reservation of land for a landing place on Mare Island as the Government may find convenient, but the ferry always to be so far under the control of the Government as to compel its

removal to any part of the public property which may be designated by the Navy Department for the convenience or advantage of the Government whenever or as often as it may become necessary with reference to the security or advantage of the public interest in the operation which may be conducted on Mare Island, and also if need be to forbid any communication between the tract called Mare Island and the opposite, but upon such conditions as the Government may think it necessary to prescribe, this control being deemed necessary to be reserved to the Government with a view to the good order and police regulations of the Navy Yard which it is the design of the Government to establish at this place. It being also understood that no building of any kind shall be erected on Mare Island upon the landing place of any ferry which may be permitted, without the consent of the Navy Department and that any building or structure which may be erected with such consent shall be subject to removal at any time by the order or authority of the Navy Department.

I am willing to accept the proposition of Mr. Aspinwall as above stated with the modifications herein made, as soon as he shall apprise me of his consent to the sale on these terms which he may do by appending that consent in a note to this letter & returning the same to me.

I am Respectfully Your Obdt Servant

John P. Kennedy.

Wm. H. Davidge, Esq., Agent of Wm. H. Aspinwall Esq., New York.

I assent fully & unconditionally to the foregoing on behalf of the several owners of Mare Island.

Wm. H. Aspinwall.

New York, Dec. 15th 1852.

The above copy reaffirmed by me as agent of Wm. H. Aspinwall this 1st March, 1853.

Wm. H. Davidge.

State of California,
County of Solano.—ss.

The foregoing instruments of writing were received by me for record on the 18th day of April, 1853 at 9 o'clock A. M.

Joseph P. Vaughn, County Recorder.

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COPY OF WILL.

The last will and testament of William P. McArthur of the United States Navy, late of the City of Washington, D. C. now of the City of San Francisco, State of California. I the said William P. McArthur being of sound and desposing mind and desposing mind and memory do make and publish this my last will and testament which is as follows: I give and bequeath to my wife Mary S. McArthur all and singular my real and personal estate of every name and description that may remain after the payment of my just debts and funeral expenses. And I do hereby appoint Joseph M. McArthur and Augustus I. Bowie Executors of this my last will and testament.

In testimony Whereof I have hereunto set my hand and affixed my seal, this the Nineteenth

day of November in the year Eighteen hundred and fifty (Nov. 19th 1850).

W. P. McArthur.

The above instrument consisting of one sheet was now here subscribed by William P. McArthur the testator, in the presence of each of us and was at the same time declared by him to be his last will and testament and we at his request signed our names hereto as attesting witnesses this the Nineteenth day of November A. D. 1850.

H. Ray Bowie
I. H. McDugall

I, John E. Addison, Clerk of the Probate Court of San Francisco County hereby certify the foregoing to be a true copy of the last will and testament of W. P. McArthur decd admitted to Probate and now on the records of said court.

J. E. Addison, Clk
per J. I. Papy, D. C.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn, County Recorder.

State of California
County of San Francisco.

The last will of William P. McArthur deceased, a copy of which is hereto annexed having been proved and recorded in the Probate Court of the

County of San Francisco, Augustus I. Bowie, who is named therein is hereby appointed Executor.

Witness John E. Addison, Clerk of the Probate Court of the County of San Francisco, with the seal of said Court affixed this 8th day of February A. D. 1851. By order of the court.

J. E. Addison, Clerk
Per J. I. Papy, D. C.

State of California
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn, County Recorder.

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KNOW ALL MEN BY THESE PRESENTS: That I, Mary S. McArthur of the City of Baltimore, and State of Maryland, widow, and sole legatee under the will of Lieut. William P. McArthur, U. S. N., have made, constituted and appointed and do by these presents make, constitute and appoint William C. Young of the City and Co. of New York and State of New York my true and lawful attorney for me and in my name, place and stead, to bargain, sell, grant, release and convey to such person or persons and for such consideration or considerations as he my said attorney shall seem most to my advantage and profit all my undivided sixteenth part of Mare Island situated in the County of *Sonoma,* and State of California, and upon such sale

or sales to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this thirteenth day of December A. D. 1852.

Mary S. McArthur [L.S.]

Sealed and delivered in presence of:
Jabez D. Pratt, Jno. J. Young.

State of Maryland,
City and County of Baltimore.

Be it remembered that on this thirteenth day of December A. D. 1852 before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California, in and for the State of Maryland aforesaid to take the proof and acknowledgment of deeds etc to be used or recorded in the State of California personally appeared Mary S. McArthur personally known to me to be the person named in and described as the party grantor to the within power of attorney and having signed and sealed the same in my presence, she acknowledged

that she executed the same as her voluntary act and deed for the purposes therein expressed.

Witness my hand and official seal on the day and year last aforesaid.

Jabez D. Pratt,
Com. for Cal.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

---

KNOW ALL MEN BY THESE PRESENTS: That I, George W. P. Bissell of the City and County of San Francisco, State of California, have made, constituted and appointed and by these presents do make, constitute and appoint William H. Aspinwall of New York my true and lawful attorney for me and in my name, place and stead to grant, bargain, and sell, lease or otherwise dispose of all my right, title and interest in that piece or parcel of land lying and being situate in the State of California, County of Sonoma, known as "Mare Island" or any part or parcel thereof for such sum or price and on such terms as to him shall seem meet and for me and in my name to make, executed, acknowledge and deliver good and sufficient deeds and conveyances for the same, and until the sale thereof to let and demise the said Real Estate for such sum as to

him shall seem meet and upon such terms as he may deem proper to ask, demand, collect, recover and receive all sums of money which shall become due, owing and payable to me by means of such bargain and sale or lease and demise, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal the thirtieth day of July in the year one thousand eight hundred and fifty two.

G. W. P. Bissell [Seal]

Signed and delivered in the presence of: the words "my right, title and interest in" interlined before signing.

E. Giles

State of California,
City and County of San Francisco—ss.

On this thirtieth day of July A. D. 1853, before me, Lewis W. Sloat, a Notary Public duly appointed and commissioned under the Great Seal of the State of California, authorized by law to take acknowledgments, dwelling in the City of San Francisco, County aforesaid, came Geo. W. P. Bissell, to me known to be the individual described in and who executed the within instrument and acknowledged

that he executed the same for the purposes ther
mentioned, of his own free act and deed.

In Witnss Whereof, I have hereunto set my ha
and affixed my Official Seal, the day and year ab
written.

[Seal] L. W. Sloat,
Notary Public

State of California,
County of Solano.

The foregoing instrument of writing was receiv
by me for record April 18th, A. D. 1853, at
o'clock A. M.

Jos. P. Vaughn,
County Recorder

---

KNOW ALL MEN BY THESE PRESENT
That I, William C. Young, Attorney for Mary
McArthur, have made, constituted and appoint
and by these presents do make, constitute and a
point Wm. H. Aspinwall my true and lawful att
ney for me and in my name, place and stead
grant, bargain, and sell, lease or otherwise dispo
of all the right, title and interest of Mary S. M
Arthur in that piece or parcel of land lying a
being situate in the State of California, County
Sonoma, known as Mare Island, or any part or pa
cel thereof for such sum or price and on such ter
as to him shall seem meet, giving and granting un
my said attorney full power and authority to do a
perform all and every act and thing whatsoever
quisite and necessary to be done in and about

premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the fifteenth day of December in the year one thousand eight hundred and fifty two.

Wm. C. Young [L.S.]

Sealed and delivered in the presence of:
Frederick Hoffman.

City and County of New York—ss.

On the fifteenth day of December 1852, before me, came Frederick Hoffman with whom I am personally acquainted, who being by me duly sworn says: that he resides in the City of New York, that he knows William C. Young & knows him to be the same individual described in and who executed the within power of attorney. That he executed the same in deponents presence & deponent thereupon became the subscribing witness thereto.

L. S. Hoffman,
Com. of Deeds, 79 *Nassen* St.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record April 18th, A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

Copy Navy Department, Dec. 13th, 1852.

Gentlemen:

You will oblige me by stating your opinion as to the value of the tract lately surveyed by you in California for a site for a Navy Yard, known as Mare Island. I desire to have your estimate of its value with all its appendages and advantages regarding depth of waters, harbors etc. Your opinion may be formed without reference to the question of title which I could not expect you to express an official judgment, my object being to obtain some guide in the estimate of its value for land and water with a view to a contract of purchase.

Very Respectfully,
Your Obdt Servt.
(Signed) John P. Kennedy.

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Comnd Jno. D. Sloat
Comdt W. S. Ogden
Lieut. I. F. Blunt
W. S. Sanger, Engineer.

Copy Washington, December 13th, 1852.

Hon. John P. Kennedy
Secretary of the Navy
Sir:

In answer to your letter of this date asking "your (our) opinion as to the value of the tract lately surveyed by you (us) in California for a site for a Navy Yard, known as Mare Island" and desiring to have "your (our) estimate of its value with all

its appendages and advantages regarding depth of water, harbors, etc" and stating that "your (our) opinion may be formed without reference to the question of title of which I (you) could not expect you (us) to express an official judgment, my (your) object being to obtain some guide in the estimate of its value for land and water, with a view to a contract of purchase," we have the honor to state the Island including the tule opposite Vallejo contains about nine hundred acres in addition to a large tract of tule extending toward Napa and Sonoma, there is ample space for all the buildings required for a Navy Yard with good anchorage for Ships of War, and as stated in our report of the 6th ult. we consider it the most eligible location near San Francisco. In reference to the value of this site for the purposes of a Naval establishment, combining as it does all the advantages stated in our Report, with respect to the depth of water and general commodiousness as a harbor, we are of the opinion tho' we are aware that a large portion of it, say nearly three fourths was recently purchased for a much less sum, that it would not perhaps be over-estimated for the contemplated uses of the United States at one hundred thousand dollars.

Very Respectfully,
Your Obdt Servt.
(Signed) John D. Sloat,
Wm. S. Ogden, Comn U. S. N.
Simon Fraser Blunt, Lt. U. S. N.
W. P. S. Sanger

State of California,
County of Solano.

The foregoing instruments of writing were received by me for record April 18th, 1853 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

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I respectfully state for the information of the Secretary of the Navy that the expenses of the Commission under Commodore Sloat for the selection of a site for a Navy Yard in California, which were properly chargeable to the appropriation of $100,000 made for that object at the last Session of Congress, so far as they have come to the knowledge of this office, amount to Eleven Thousand Five Hundred and eight dollars and twenty cents.

It is probable that all the accounts which include such expenses have been rendered.

H. O. Dayton,
4" Auditor.

4" Auds Office
December 28, 1852.

State of California
County of Solano.

The foregoing instrument of writing was received by me for record April 18th, 1852 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

State of California,
County of Solano—ss.

I, F. M. DICKEY, County Recorder in and for the County of Solano, State of California, do hereby certify the annexed to be a full, true and correct copy of the original record thereof, as the same appears of record in my office in Liber H. of Deeds, pages 7 to 24 inclusive, And I do further certify that I have compared the same with the original record thereof.

In Witness Whereof, I have hereunto set my hand and seal this 18 day of May, A. D. 1931.

F. M. Dickey,
County Recorder.
M. E. Buckingham,
Deputy Recorder.

Mr. PECKHAM: We offer as Government's Exhibit "F" the report of the Smith Board for the adoption of a site for a Navy Yard on the West Coast, together with the reservation withdrawal from entry by President Fillmore, dated November 6, 1850, of Mare Island, and, "7th, the land on the eastern side of Mare Island Straits, beginning at the hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the straits, so as to join them at a point about 800 yards north of the northernmost high hills on the eastern side of the straits." That is the executive order of President Fillmore: [177]

This was before the passage of the act authorizing the purchase of the reservation as a Navy Yard, August 31, 1851.

(The report of the Smith Board, etc., is received in evidence as "Plaintiff's Exhibit F".)

PLAINTIFF'S EXHIBIT F.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of Executive Order, dated November 6, 1850, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. Parrott
Acting Assistant Commissioner of the General Land Office.

The President of the United States, exempts and reserves from sale, for public purposes, the follow-

ing tracts or parcels of land in the State of California.

In the Bay of San Francisco, California.

1st. From a point 800 yards south of Point José to the southern boundary of the Presidio, along the southern boundary to its western extremity and thence in a straight line to the Pacific ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point, and Point Lobos.

2d. From the southern boundary of Sau Solito bay, a line parallel to the channel of entrance, to the Pacific.

3d. Yerba Buena Island.

4th. Alcatrazes Island.

5th. Angel Island.

On the Eastern side of the Bay of San Pablo.

6th. Mare Island.

7th. The land on the Eastern side of Mare Island straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the straits so as to join them at a point about 800 yards north of the northernmost high hills on the eastern side of the straits.

Millard Fillmore

Washington, Nov. 6, 1850.

[Matter in margin illegible.]

UNITED STATES OF AMERICA
War Department

Washington, July 13, 1931.

I hereby certify that the papers and sketch attached hereto are true copies of the originals in the Office of the Chief of Engineers, U. S. Army and described as follows:

Report made to the Secretary of War March 31, 1850, by John L. Smith, Bvt Col and Senior Member of the Commission of Navy and Engineer Officers for the examination of the Coast of the United States on the Pacific; and sketch accompanying report.

Lytle Brown
Major General, Chief of Engineers.

I hereby certify that Lytle Brown, who signed the foregoing certificate, is the Chief of Engineers, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Patrick J. Hurley, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of July, 1931.

[Seal] Patrick J. Hurley
Secretary of War.
By F. M. Hoadley
Assistant Chief Clerk.

To the Honble the Secretaries of the War & Navy Departments, City of Washington.

San Francisco (California) March 31, 1850.

Gentlemen:

The last communication to you from the Commission of Navy and Engineer Officers for the examination of the Coast of the U. S. on the Pacific was dated October 31, 1849, on the eve of our departure for the Sandwich Islands, with a crew furnished for our vessel by Commo. Jones which were to be transferred to the Prebble on our arrival at Honolulu.

In that communication we stated the objects of our visit to the Sandwich Islands to be the procurement of a permanent crew for the Massachusetts, which we had not been and were not likely to be able to effect in these waters, and also to have our vessel thoroughly calked and otherwise repaired which could be done there with more economy and despatch than in this neighborhood.

We left here on the 1st of November and altho we expected to be back by the middle of January we did not reach here until the 17th of this month. Our absence two months longer than had been expected was occasioned chiefly by the time we had to wait at Honolulu until the repairing of our vessel could be commenced, and the time occupied in effecting it—the workmen at the time of our arrival being unable to attend to our vessel until the repairs of a number of whale ships that had prior claims to their services should be completed; and the repairs

needed being far more extensive than had been expected.

Except the disadvantage of the loss of time just mentioned, the objects of our visit to the Sandwich Islands were successfully accomplished. We were very fortunate in shipping a sufficient crew of good men, and our vessel that was scarcely seaworthy is now in good order.

We had hoped to be able to complete our examinations here and to the south of this previously to going to Oregon but the season is now so advanced that it cannot be attempted. The chief difficulties to be encountered in the performance of our duties are supposed to be in the Columbia river and it is therefore our desire to be there, or in its neighborhood, in readiness to take advantage of a favorable time for the examination.

But the most important of our duties relate unquestionably to those waters and we therefore deemed it of paramount importance that our examinations here should be made to the extent necessary to enable us to report our opinion without delay, respecting the minute surveys, levelling, and soundings required to be made to afford the detailed information upon which works of defense and a site for a naval depot would be decided on.

On this account and also to be in the way of receiving any instructions that might during our long absence have reached here for us, we determined, on leaving the Islands to come directly here.

Commo. Jones not being here on our arrival we followed him to Benicia to procure his order

for a transfer to our vessel of some of the Steam Engineers that arrived here in the Falmouth during our absence.

While there we received your communication of the 11 of Dec. last. We also examined Mare Island straits and the ground on each side of them.

We had heard while at Honolulu of the favorable result of soundings made there, at our request, by Lt. Commdg. McArthur of the U. S. Sch. Ewing, in company with Lt. Blunt of our Commission. A copy of the sketch of them furnished to us by Lt. Commdg. McArthur is sent herewith.

Since our return here from Benicia we have examined the land on the southern side of the entrance from the sea and also the Islands in this neighborhood. We had examined the northern side of the entrance some time ago.

The result of our examinations enables us to state the following as the surveys levellings and soundings in these waters which will be needed to afford the information desired as a guide to our decisions.

1. From a point 800 yards south of point José to the southern boundary of the Presidio, along that southern boundary to its western extremity and thence in a straight line to the Pacific, passing by the southern extremity of a pond that has its outlet into the channel between Fort point and Point Lobos. The surveys and levellings to be minute at point José and to the distance of 800 yards south of it,—and at Fort point to the distance of 1200 yards around it inland. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

2d. From the southern boundary of Sausolito, by a line parallel to the channel of entrance, to the Pacific. The surveys and levellings to be made minute from Cavallo point westwardly along the ridge to Cavallo or Horse Shoe Cove, across that cove to a point which is nearest to Fort point on the opposite side of the channel and along the shore to a distance of 600 yards west of point Diablo toward the entrance of the harbor and 800 yards back from the line. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

3d. Soundings from and including the entrance of the channel and through it 600 yards above Sausolito cove at the north; the southern extremity of San Francisco city at the south; a line in a westerly direction around Yerba Buena Island not nearer to it than 600 yards; a line thence to the mouth of San Pablo bay and thence to a point 600 yards north of Racoon Straits. These soundings would include all the channels leading from the sea to San Francisco and San Pablo bay.

4th. Minute survey and levelling of the whole of Mare Island and a general survey and levelling of the land on the eastern side of Mare Island Straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former and extending on a line nearly parallel to it to a point opposite the northern extremity of Mare Island and thence to the straits so as to join them at a point about 800 yards north of the northernmost high land on the eastern side

of the straits. The soundings to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves beyond that depth throughout the whole of Mare Island straits and also the entrance to them from the straits of Karquines; also of fathom curves to the distance of two miles west of Mare Island in the bay of San Pablo.

It is our duty to specify what extent of ground may be necessary for the public use in connection with the several objects we are expected to report upon officially and we think it proper our opinion should be stated without delay that the Govt. may have due time to act upon the matter.

We therefore recommend the reservation for public use of all the land embraced by the several surveys above specified together with Yerba Buena, Alcatrazes and Angel Islands in San Francisco bay. It is possible a portion of these lands may be dispensed with but that cannot be judged of until after the surveys shall be completed. It will be easier to relinquish what may not be needed than to get back what may have been prematurely given up.

As the accompanying sketch of the soundings in Mare Island straits does not show the topography it may be proper to state that it is in many respects decidedly favorable and in no respect unfavorable to the establishment of a naval depot on Mare Island. It may be proper also to state that vessels may reach the position from the sea without finding a less depth than 6 fathoms.

There will probably be recommended strong works near Fort point on the south side of the channel

and also on the north side of the channel nearly opposite to Fort point. There would be works of chief importance for the defence of the entrance to the harbor. Batteries at point José and on Alcatrazes Island would cooperate with the exterior works and altho' as auxilliaries they may be regarded as of secondary importance the value of the latter is far greater than that of the former and nearly equal to that of the works at Fort point and opposite to it. A temporary battery on Angel Island opposite Alcatrazes would cooperate with the latter in defending the approach to the bay of San Pablo by the south channel—and a temporary battery on Racoon point opposite Angel Island would defend the channel leading thro' Racoon straits to the bay of San Pablo.

We expect to sail for Oregon in the course of a week.

Respectfully submitted on behalf of the Commission by your obedient servant,

G. L. Smith
Bt. Col. and Senior Member

For the Secretary of War.

[Endorsed]:

S5627—6

San Francisco, Cala. March 31, 50.

2 Letters

Col. John L. Smith, Sen. Member Commn.

Reports their return from the Sandwich Islands—& of their examination of the Bay of San Francisco.

S128. Rec May 8, '50.

Engr. office

Engr. Dept. Rec'. May 21, 1850.

Recommends certain surveys and soundings to the reservation, for public use of all the land embraced by these surveys.

[Map accompanying this Exhibit omitted by stipulation of counsel.]

Mr. PECKHAM: We offer as Government's Exhibit "G" the report of the Sloat Board, to which are annexed two plans, 7 and 8, also exhibit notes and memoranda of the records of the action of the Sloat Board.

(The report of the Sloat Board, plans, exhibit notes and memoranda are received in evidence as "Plaintiff's Exhibit G".)

PLAINTIFF'S EXHIBIT G.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States of America—Navy Department

I hereby certify that the annexed copy of report of the Board appointed to examine the shores and waters of the Bay of San Francisco, in California, for the purpose of selecting a site for a Navy Yard and Depot, dated November 6, 1852, is a true copy of the original on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of

our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,
Secretary.

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Navy Department, November 6th, 1852.

To the Honorable, the
Secretary of the Navy.

Sir:

The Board appointed to examine the shores and waters of the Bay of San Francisco in California, for the purpose of selecting a site for a Navy Yard and Depot, including a Naval Hospital and Marine Barracks, have performed the duty assigned them and have the honor to submit the following Report with plans:

No. 1—Plan of Rincon Point and Mission Bay with soundings.

No. 2—Ringgold's Chart No. 1, being a chart of the Bay of San Francisco.

No. 3—Ringgold's Chart No. 2, being a Chart of the Bay of San Pablo, Straits of Carquines and part of the Bay of San Francisco.

No. 4—Plan of Saucelito with soundings.

No. 5—Aspinwall Bay with soundings.

No. 6—Ringgold's Chart No. 3, being a chart of Suisun and Vallejo Bays.

No. 7—Plan of Mare Island showing the Topography of the land, and soundings through Mare Island Straits.

No. 8—Plan of part of Mare Island, showing the positions of the several proposed buildings and other improvements.

The Board left New York by the steamer of the 24th March last, and arrived at San Francisco on the 28th April following; there being no suitable vessel to San Francisco belonging to the Government, and the Naval vessels in port being unable to supply the wants of the Board, the most appropriate vessel which could be found was purchased without delay, and measures immediately adopted to effect such repairs and arrangements as were necessary for the service to be performed; and as these preparations would necessarily occupy some time, it was deemed a favorable opportunity to learn something of the resources of the country for furnishing such building materials, as would be required at the yard. Accordingly a portion of the Board made excursions into the interior, and the result of their enquiries will be found in another part of this report.

R. D. Cutts, Esqr., commanding the Schooner Baltimore, and attached to the Coast Survey, being in port, and having recently been employed in surveying some of the points which were to be examined, kindly furnished such copies of his work as were desired, and the Board are under great obligations to him, for his polite attention and the assistance derived, from the result of his labors.

The vessel having been properly fitted for the service, the examination was commenced at Rincon

Point and Mission Bay, and as the sketches of these points furnished by Mr. Cutts exhibited the Topography very clearly, the use of instruments on shore was deemed unnecessary; the Board however, made a careful personal examination of the ground, and sounded along the lines as indicated on Plan marked No. 1.—The two points being contiguous, were embraced in one examination, and the advantages and disadvantages which apply to the one, are generally applicable to the other.

In the letter of instructions from the Department the particular attention of the Board is directed to seven points of examination, the first of which is: Its security from attack by an enemy, and its facilities and economy for defence."

On this point it may be said that both Rincon Point and Mission Bay, and indeed the City of San Francisco itself are all at present exposed to the attack of an enemy, there being no fortifications capable of preventing a hostile fleet from entering the harbor and destroying the city. It is presumed however, that the entrance to this important Bay will soon be fortified, and then the only direction from which an attack could be made, would be from an enemy landing on the shore, at some points south of the entrance to the harbor. It is probable that there would be great difficulty in landing a large force on the beach, but the danger most to be apprehended would be sudden attacks from small parties, who might land and by a rapid march of some five or six miles, approach the yard,

fire it, and make good their retreat, without much hazard to themselves.

The plan of the City of San Francisco embraces both Rincon Point and the shores of Mission Bay, and it is presumed, that at some future day, when that portion of the city has been built upon, and valuable property accumulated in that quarter, measures will be adopted to guard against attacks from an enemy landing south of the entrance to the harbor, and when that is accomplished, Rincon Point and Mission Bay, would be protected, for an enemy could not approach them from the sea-shore without first passing through the city. At present however, the Board regards these points insecure from attack and incapable of defence, except at very heavy expense, the amount of which we are not able to estimate.

Second. "Its security from violent winds and sea, and the accommodations for safe anchorage in its adjacent waters." From Rincon Point to the south side of Mission Bay, there is good anchorage for vessels of heavy draft of water, but the whole line of shore is exposed to the southeast, from which quarter violent gales prevail during winter, heaving in a heavy sea, which breaks with great force along the shore, thereby endangering vessels at anchor and rendering it impossible for them to lay in safety alongside of wharves.

Third. "Its adaptation to the construction of a permanent stone dock, and for working a sectional dock in connection with a Basin and Railways, if a

Basin and Railways be practicable in those waters."

The appearance of the shore between high and low water marks, from Rincon Point to the north side of Mission Bay, would indicate a favorable foundation for a permanent stone dock, being of stone and hard gravel, the stone is of volcanic character and occasional strata of sand stone, neither of which would be suitable for building purposes, though the ledges would furnish a good foundation for the superstructure of a stone Dry Dock. For the working of a sectional or other floating dock, in connection with a basin and railways or otherwise, the Board regards this location as highly unfavorable; in addition to the want of protection from violent gales and heavy seas, the water near the shore is too shallow for the purpose, and the ground rising abruptly from the water to a mean elevation of about seventy feet, it would be impossible to obtain sufficient table land for the accommodation of the Basin, and Railways, without incurring an enormous expense. These remarks apply more particularly to Rincon Point; at Mission Bay there is not sufficient depth of water for the use of any kind of dock suitable for Naval purposes.

Fourth. "The facilities for procuring and the accommodation for boarding mechanics and workmen of various classes."

These sites are in the immediate vicinity, in fact within the limits of the largest city on the Bay, and therefore at present have an advantage over other places in the facilities for procuring workmen and

accommodations for them. We do not, however, regard this point as of great importance for in this country where towns and cities spring up as it were by enchantment, it is presumed that wherever the Government may decide to locate the Navy Yard, there workmen will soon concentrate and provide suitable accommodations for their comfort.

Fifth. "The facilities afforded for procuring most readily, materials, supplies and stores of all kinds."

The subject of building materials will be spoken of generally in another part of this Report. With regard to supplies and stores of all kinds, the sites in question being at a short distance from the business part of San Francisco, these articles could be delivered at them with great facility.

Sixth. "Its fitness and adaptation for the construction of piers, wharves, launching slips, and buildings ways, store houses for reception and keeping of various stores, marine barracks and hospital work shops of the different kinds required for the building and repairs of sailing and steam vessels of the Navy, and such dwellings for the officers attached to the yard as you may deem necessary."

Wharves and piers to be permanent must be constructed of stone, and the bottom furnishes a good foundation for walls, while the rock above water though unsuitable for building purposes, would supply an abundance of excellent material for filling in. This stone above high water is in a state of decomposition, and may readily be removed by a

pick. Ordinary wharves and piers however would afford no protection to vessels during the prevalence of southeasterly gales; as before stated, and as will be clearly seen on reference to plan No. 1 on which the topography and soundings are delineated, the ground is so elevated as to require an immense outlay, before it could be reduced to a proper grade for the construction and convenient use of buildings of any kind required in a Naval establishment, and in view of those considerations, the Board regards the sites under examination as unsuitable for a Navy Yard.

Seventh. "The effects of the Marine worms."

From information obtained from shipwrights and others employed along the shore, as well as from our personal observations, we are of the opinion that the existence of the marine worms and their destructive action in the harbor of San Francisco, are serious objections to that vicinity for the purposes of a great naval station.

After careful examination and much reflection on the subject, the Board cannot discover that Rincon Point and Mission Bay possess any advantages which should recommend or entitle them to serious consideration, as favorable sites for a Navy Yard; on the contrary there are many objections already enumerated, to which may be added the great danger to be apprehended from fire, by their close proximity to, and the position to leeward of the City of San Francisco, which is mainly of very combustible materials and which has already been

several times nearly destroyed by this devouring element.

Having concluded the examination of Rincon Point and Mission Bay, the Board next proceeded to explore the shores of the Bay of San Francisco, to a point nearly opposite the San Jose Mission and distant from San Francisco about twenty five miles. On the west shore there are many indentations which appear to present favorable sites, but upon sounding they were found to be too shallow for Naval purposes, none of them affording more than ten feet of water. Off Point Avisedera deep water was found near the shore as indicated on Ringgold's Chart No. 1; the land however is very high, and the same objections in regard to exposure which apply to Rincon Point, exist here. Along the whole west shore there is generally deep water near the projecting points, but opposite the Bays the three fathom line of soundings was found from one to two miles from the beach. This side of the Bay is accessible to an enemy from the sea shore; the channel though affording water for the largest ships is extremely narrow, and the prevailing winds during a large portion of the year, are adverse to the passage of vessels bound for sea. On the east side of the Bay the three fathom line was found from three to five or six miles from the shore, and within that line is an extensive shoal, as shown on the chart above referred to.

The result of this examination was such as to satisfy the Board beyond a doubt, that there is no

site on either shore of the Bay of San Francisco, south of the city, which possesses any advantages or recommendations, or where it would be practicable to construct a Navy Yard capable of supplying the wants of the service upon this extensive and important coast.

The Board then visited the Island of Yerba Buena, opposite the City of San Francisco. On the east side of this Island is a small bay exposed also to southeast gales, having from five to seven fathoms water, and good anchorage; the land is broken and elevated, being 300 to 500 feet above the sea, and there is no table ground suitable for the erection of buildings for Naval purposes. The Island possesses none of the requisites to recommend it as a proper or practicable site for a Navy Yard.

Clark's Point, or as it is called on Ringgold's Chart No. 2, Point Montgomery, is situated on the north side of San Francisco; there is deep water near the shore, and good holding ground, but the anchorage is much exposed and uncomfortable, the land is very high and precipitous, and there is nothing to recommend the location as on any account suitable for Naval purposes.

Saucelito on the north of the Golden Gate, and at the entrance to Raccoon Straits, as seen on Ringgold's Chart No. 2, is the point at which the provisions and stores of the Pacific squadron are now stored. The water in the Bay is deep, and there is good holding ground and anchorage for a large number of vessels, where they are well protected

from north, south and west winds, but are much exposed to east and southeast gales. The lands at Saucelito are much broken and very high, the amount at a moderate elevation being very inconsiderable and entirely inadequate for a Navy Yard. It may be attacked by an enemy landing on the coast, and would require a large outlay in fortifying the hills for its protection. Soundings were taken at this point, which with the topography of the country are shown on Plan No. 4. The approach to this place is at times very difficult, owing to the baffling winds caused by the broken and irregular high lands, and the rapid and varying currents through Raccoon Straits; here is a fine spring of excellent water from which all the shipping and many of the inhabitants of San Francisco obtain their supplies; it is on private property, and the water is sold at a high rate. As a watering place Saucelito may be considered valuable, but it is not regarded as possessing the requisites of a great Naval establishment.

Angel Island, east of Saucelito has deep water near its shores, but the land is so high and precipitous as to render it unavailable for useful purposes, except at Raccoon Cove, on the straits of the same name; this beautiful spot is entirely sheltered from all winds, has deep water and good anchorage, but the extent of water and available land is entirely too limited to render it worthy of particular examination for naval purposes.

There is an abundance of water throughout the the whole extent of Racoon Straits, but neither

shore presents any sites in the least degree favorable for a Navy Yard.

Aspinwall Bay, situated northwest of Angel Island, as seen on Ringgold's Chart No. 2, was next examined. At this place soundings were taken as indicated on plan No. 5; there is a sufficient depth of water with good holding ground and anchorage for a large number of vessels. This anchorage is exposed to the north, northeast and east winds, but otherwise sheltered. The land is generally high, with a small amount of table ground near the water; from the shore a flat extends to the deep water which could readily be filled in from the hills, and it is believed that a sufficient area could be obtained, to form an admirable site for a Navy Yard.

Being limited as to time under the estimate made by the Department, for the full completion of the work entrusted to us, and having before us the experience of a preceding Commission appointed for a like object; aided too by a topographical survey of the same by Mr. Cutts of the Coast Survey, we were induced to abandon this locality for the present, in search of one, that those two authorities seemed to concur in indicating as better adapted to our wants. With these views, under the above restriction as to time, reiterated by the Department under date of 30th April last, it seemed impossible to give detailed Hydrographical and Topographical surveys for the working plans of both, and hence a less minute examination of this point was made, than was perhaps under all the circumstances, de-

sirable; nevertheless the sequel will show, that we had not made a wrong estimate with regard to the site, that eventually most particularly elicited our attention.

Should the Department however, be unable to establish the title of the Government to Mare Island, or effect a satisfactory arrangement with those persons who claim to be its owners, the Board is of opinion that Aspinwall Bay is well worthy of a more thorough examination. From Aspinwall Bay through the Straits and Bay of San Pablo to the Straits of Carquines, there is a good channel way with sufficient water for the largest ships. The line of three and a half faths, except at points, is at a great distance from the shore, and where deep water approaches the shore, the land is high and in no place suitable for naval purposes; this passage will be seen on Ringgolds Chart No. 2. Through the Straits and Bay of San Pablo to the Straits of Carquines and Vallejo Bay there is deep water with a strong current; on the south side the channel approaches quite near the shore, but the lands are very high and the banks abrupt affording no space for any useful purpose; on the north side are Southampton Bay and Benecia and Navy Point.

Soundings were taken across the entrance to Southampton Bay, and along the east side towards Benecia; the water in the Bay is very shallow, indeed a large portion of it is bare at low tide. Opposite the east point of the entrance to this Bay, the channel approaches the shore and is very deep, but

the extent is small and the auchorage exposed to the strong winds which almost invariably draw through Carquines Straits; the land is high and unfavorable and the point possesses no advantages. Near the east end of Benecia the Pacific Mail Steamship Company has established its works, and are about erecting extensive foundries and workshops. This point was examined but no place could be found adapted to the wants of the Navy; the water is shallow near the shore, there being less than three fathoms at a distance of five or six hundred feet from the shore, while the currents were rapid and irregular, causing vessels to lay very uneasily at their anchors. Along the shore there is a large extent of tule land which has been sounded sixty feet before reaching hard bottom, while inside the tule, the land rises in high hills.

It is believed that Navy Point has been recommended as a suitable place for a Navy Yard, but the Board was unable to discover that it possesses any advantages except deep water near the shore. The anchorage is unsafe, the bottom being rocky, and the large body of water discharged from the Sacramento river and Suisun Bay, which is much contracted at this point, being at times forced with great violence into Vallejo Bay, causing vessels to drag or lose their anchors, and often exposing them to great danger of being thrown upon the rocks. The land rises almost perpendicularly from the shore to the height of from one to two hundred feet, rendering it totally unfit for any purposes without an immense outlay for grading. The locations of

the several points above alluded to, will be seen on reference to Ringgold's Chart No. 3.

The point which presents the most favorable appearance for the location of a great Naval establishment, is Mare Island, on the north of the entrance to Carquines Straits, and bounded on the east by Mare Island straits, which separates it from the city of Vallejo on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma. The surface of this Island at the south end is broken and elevated, some of the hills rising to the height of 280 feet, but at the north end it is more uniform and may be easily reduced to a convenient grade. A careful survey of this Island and Straits has been made, and the soundings and elevations of the land will be seen on plan No. 7.

In reference to the security of this point from attacks by an enemy, and its facilities and economy for defence, the Board, as directed in their letter of instructions, called upon Capt. H. W. Halleck of the Engineers, by letter of 24th June, asking his opinion upon that subject. A copy of the letter with his reply, dated July 1st, 1852 is hereto appended. Mare Island is situated at the distance of about 20 miles from San Francisco, which latter point it is presumed will at an early day be protected by heavy fortifications on either side of the Golden Gate or entrance to the Bay. This done, the Island will be secure from attack in that direction, and at the present time it could be readily defended by field works upon the heights at the south end; the west

side could only be approached by small boats, that part of the Bay of San Pablo being too shoal to admit of the passage of large craft. It has been supposed that a landing might be effected at Bodega, distant about 60 miles, and this Island approached in that direction through the valleys of Napa and Sonoma; the Board is of opinion that there would be no difficulty in defending that quarter by slight works upon the hills in the rear of Vallejo, which command Napa Straits and the Island. On this point the Board concurs with Capt. Halleck in the opinion that "Mare Island is admirably calculated for defence, not only from its position, but also from its topographical character."

A slight inspection of Ringgolds Chart No. 2 will show how admirably vessels laying in Mare Island Straits would be protected from winds and sea, and plan No. 7 shows that there is a channel way for vessels of the largest class, at high water, or at afternoon low tide; the entrance of such vessels at the morning low tide would be difficult. The holding ground is good, and there is ample space for a large naval force to anchor in safety.

The whole substratum of this Island is believed to be of sand stone, and from appearances there is every reason to believe that building stone of excellent quality and in any required quantity may be obtained from the hills. There is no doubt of the practicability of obtaining an excellent foundation for permanent stone docks, and when the present prices for labor shall become somewhat reduced,

they may be constructed at a reasonable cost. Basins and railways can be constructed here if deemed expedient, and there is sufficient depth of water for the working of a sectional dock in connection with a Basin or otherwise.

At present there are no mechanics or workmen in the vicinity of Mare Island; Vallejo, the capitol of the State is distant less than a mile, but the population is very small and it contains no workmen of the description required at a Navy Yard. Should the Government commence a system of improvement there would probably be no more difficulty in procuring mechanics and other workmen at Mare Island, than at any other point, as these men naturally locate themselves where employment is to be obtained.

If Mare Island should be selected as the location for the Navy Yard, a small steamer would be necessary, as no supplies or stores can be at present obtained in the vicinity; with such convenience they could at all times be readily procured from San Francisco, the distance being less than two hours run. The erection of public works on Mare Island would doubtless impart an impetus to the growth of Vallejo, and in a short time all ordinary stores and supplies would be found there.

This point is well adapted for the construction of piers, wharves, launching slips, building ways, store houses and all other works appertaining to a complete and perfect Navy Yard, and it is believed that there is no site on or near the Bay of San Francisco which possesses so many of the requisite qualities.

That portion of the Island which it is proposed to occupy, lies at a moderate elevation, and the amount of necessary grading will be inconsiderable compared with that required at other points. There is deep water near the shore, the anchorage is good, and as the substratum is of rocks it will furnish good foundations for piers and other structures.

While at Mare Island straits, the Board had an opportunity of examining a wharf at Vallejo which had been built more than twelve months, also a buoy which had been about eighteen months upon Commission rock, and could find no evidence of the existence of the marine worms; from our own observations and the information derived from others, we feel confident in the belief that they do not exist in these waters. The water was tested on several occasions and found quite fresh.

Very careful soundings were taken throughout Mare Island Straits, the results of which will be seen on plan No. 7, from which it appears that there is an ample depth of water for ships of the largest class. The basis for tidal reductions, was a series of observations of all the high and low waters during one lunar month. The tides exhibited so unusual a difference between the heights of successive low waters, as to make it inadmissible to take a mean of them as a plane of reference, and instead, the extreme low water observed, was taken as the plane to which all the soundings were reduced.

If the mean of all the low waters observed between 6 a. m. and noon be taken as zero, the mean of all the low waters observed between 6 p. m. and mid-

night, would be 3.88 feet higher, whilst the mean rise and fall of tide was only 4.75 feet and the extreme 9.10.

With so wide a difference between the heights of low waters, it is plain the best reduction was to the extreme low water observed; or 2.83 feet below the mean of all the low waters; this was adopted, and consequently at mean low water there will be actually nearly three feet greater depth of water than the plan shows. The high waters occurring also between six a. m. and noon, and those between six p. m. and midnight, exhibit also a difference, giving the latter the greatest height by one foot and four tenths.

The velocity of the current about the time of spring tides as ascertained by several days observation was three marine miles per hour, and the general set, parallel to the shore.

Near the centre of the straits there is a sand stone ledge, a portion of which is bare at low tide, and upon this ledge it would be advisable to erect a beacon, or if deemed desirable, it could be removed. Between the ledge and the Island there is at high water a channel way for ships of the line. In making the soundings the bottom was generally found to be a stiff clay or soft mud, rock being found in but few places, as marked on the plan. Lines of levels were taken upon the land, and the elevations will be seen on plan No. 8. Along a part of the front of the Island there is a strip of tule land upon which borings were made to ascertain the nature of the bottom. The first was made on line

No. 30, plan 8, near the outer edge of the tule, and hard clay was found at the depth of 23 feet below the surface; after boring through 6½ feet of this clay, sand stone was reached at 29½ feet below the surface of the tule, which is generally 67/100ths of a foot above ordinary high water. The next boring was on line 26, same plan, near the outer edge of the tule; hard clay was found at 21½ feet and rock at 27½ feet below the surface. The third trial was made on line No. 22, and hard clay was found at 20 feet, through which the auger penetrated 8 feet, when its further progress was arrested by sand stone. The fourth boring was on line No. 18 where hard clay was met at 18 feet and the sand stone at 27 feet below the surface of the tule. These borings occupying a large extent of the tule, presenting very uniform results, it was deemed unnecessary to extend the examination further, it being evident that the tule land was a mere deposit of inconsiderable depth upon a foundation of rock.

The result of our examinations is such as to satisfy us beyond question, that Mare Island is the most eligible site for a Navy Yard within the waters of the Bay of San Francisco, or its vicinity. The surface of the land is favorable to the erection of buildings; there is ample depth of water for working of permanent stone or floating docks, and good safe anchorage with abundant space for a large number of ships of war to lie in safety. The only serious difficulty is the absence of fresh water on the Island; this deficiency may be supplied by the construction of a suitable number of cisterns to receive

and retain the rain water during the rainy season, and a steam water tank would be required, to supply the vessels from the river above Benecia. Under all the circumstances we therefore recommend its adoption as the most judicious selection which can be made, and have accordingly prepared a plan for its improvement.

Mare Island contains, including the tule opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, though it is not proposed to occupy the whole of this large area for the Yard. A portion will be required for Hospital, Magazine, Barracks and Coal Depot, while the high land at the south end can be used for grazing Government stock and may be advantageously occupied by works of defence.

In view of the great and increasing importance of our commerce on the Pacific coast, and the remoteness from all other Naval Stations, the Board has deemed it proper to present a plan for a Navy Yard on an extensive scale, providing all the conveniences and accommodations requisite for building and equipping large fleets of steamers as well as sailing vessels, when the exigencies of the country shall require their presence in those waters.

Plan No. 8 presents the arrangements proposed; the line of wharf front is in deep water, there being generally a sufficient depth for the largest ships of the line to lie in safety; this line is in the direction of the current, and extends the whole length of the island, a distance of about two miles. In accordance with the letter of instructions we have located

a site for a Basin and Railway, for the floating dock, sites for a stone Dry Dock, and two ship-houses with launching ways; work shops and timber sheds are placed conveniently near the docks and ship houses, and a wet Basin with eight additional docks is located where vessels in ordinary may be laid in safety. The foundry and workshops necessary for the construction and repair of steam engines and other machinery, with the anchor and chain cable shops are placed at the north end of the yard to leeward of all other buildings, and contiguous to the water. Store houses for provisions and other stores are located centrally and near the water; suitable dwellings for officers are proposed, as it will be difficult, if possible, for them to procure accommodations elsewhere; spaces are marked out for the Marine Barracks, Hospital and Magazine, and it is believed that the arrangements generally will be found such as to afford great facilities for the execution of the public work and abundant accommodations for all the demands which may be made upon this yard, for many years to come.

As before stated, while the vessel was preparing for the surveys, the Board conformably with its letter of instructions, made an excursion into the country, for the purpose of learning something of its resources for the supply of building materials. At Sacramento City the party separated, one portion ascending the river about one hundred and twenty miles to Colusa, while the other explored the country in the direction of Marysville, Grass

Valley, Auburn, and the north fork of the American river.

Along the banks of the Sacramento above the Feather river, there is a very heavy growth of oak timber; many of the trees are of immense size, and shapes admirably adapted for ship building, but upon examination the timber was found utterly worthless for any purpose except firewood, and very inferior for that; wheelwrights and others who use oak timber, stated that the oak of the country had neither strength nor durability, and that it was not used except for firewood. About forty miles from Colusa, yellow and white pine with red wood of excellent quality was said to be found in great abundance, but its distance from water would render it impossible to get it to market at present, at a reasonable cost. In the vicinity of Amadore, about fifty miles from Sacramento towards the interior, there is a species of bastard live oak, which is said to be strong and durable timber; the trees are all small and unsuitable for ship building. White and yellow pine are found in this neighborhood of good quality, but too distant from water courses to be available.

Within a few miles of Grass Valley, in Nevada county, pines, both white and yellow, become common and are of large size; both varieties differ in foliage and fibre from the ordinary pines of the Atlantic coast. One variety will yield abundantly pitch, tar and turpentine, from the appearance of scarified trees. Near Greenhorn creek, pines of five feet diameter as well as red wood timber were

found in great abundance. For the present, this timber for naval purposes would be useless, except for tar &c it being too distant from any stream of sufficient size to transport it to a market.

In the vicinity of Auburn, near the North fork of the American river, the country abounds in excellent white and yellow pine timber, and to the foot of the Sierra Nevada range the country is covered with excellent pine, red wood and fir timber.

The North fork is a stream of ample size during the rainy season, to "run" logs, cut upon its banks, upon which, and the country adjacent, there is an abundant supply. For the present, owing to the high price of labor, the timber could not be obtained as cheaply as from Oregon, and other parts of California; it is nevertheless available if a necessity for it should exist. No oak timber of any value for building purposes is to be found in this section.

The principal growth of timber immediately contiguous to the Bay of San Francisco, is the red wood, a species of cedar, soft and unfit for ship building, but an admirable material for all constructions on land, where great durability rather than strength is required; for piles, wharf timber and many other purposes it would be excellent.

Some thirty miles towards the head of the Bay there is said to be large tracts of oak of two varieties; one is an evergreen, resembling the live oak, the wood tough and of large fibre, but the trees are small and not suitable for naval purposes, except that they might furnish good knees. The other species somewhat resembles the pasture oak

of the eastern states, but this timber is of little strength, and can scarcely be considered valuable for building purposes.

Although California seems to be deficient in good timber for ship building, it is believed that an abundant supply may be obtained from Oregon. Large tracts of excellent oak timber are said to be found near the head waters of the Columbia river, which can easily be rafted to navigation. There are two varieties of fir, found in great abundance on the coast; the red, which in California is usually called Oregon pine, is not considered a superior timber for any purpose, but the yellow fir is much better, being free from knots, wind shakes &c and an excellent timber for heavy girders and joists, and would probably answer for deck plank. Besides these there is an excellent quality of spruce, very white, clear of knots and strong; the trees grow to an immense size, and will make valuable spar timber.

At Monterey and several other points on the Coast, are large tracts of a species of hard pine which yields turpentine in abundance. The Board is of the opinion that the timber resources of the country may be greatly increased by the planting of locust, chestnut and walnut, and any other ship timbers which will grow in this climate. The country generally, it is believed, is favorable to the growth of chestnut and locust, and much Government domain might be advantageously appropriated to this purpose.

The Board would also recommend to the Department, the speedy introduction of hemp into California, as the indigenous hemp of the country, is of good, fine, long fibre, and very strong.

This country abounds in sand stone, which is found in many places, of excellent quality; in the vicinity of Benecia a quarry has been opened which yields a very fair stone, and one on the west side of the entrance to Southampton Bay is now worked, which furnishes stone of excellent quality, which is used extensively in San Francisco. This quarry is in the hands of a company who contemplate erecting steam works and machinery for cutting and dressing the stone. On Mare island there is an abundance of sand stone, probably as good as any in the vicinity. A very hard sand stone is found in great quantity at Angel Island, also at Yerba Buena, which is now much used in San Francisco for foundation walls to heavy buildings.

Lime stone of excellent quality and in immense quantities, is found at Monte Diablo and at Santa Cruz. The stone from Monte Diablo produces a fine specimen of lime which is now extensively used in San Francisco and highly approved. Near Santa Cruz a very good marble is found in abundance, which will probably in a short time be introduced as a building material. Clay for making bricks, is abundant, and the brick yards at Benecia and other points in the vicinity, furnish bricks in great quantities of good quality for rough work.

As soon as the Board became satisfied of the superiority of Mare Island for a Naval Station, ap-

plication was made to the District Attorney to ascertain in whom the title to the Island was vested; this investigation occupied some time, and it was only as the Board was on the eve of leaving California, that the papers relating to the title were received. In the meantime having learned that the Island was claimed as the property of Capt. G. W. P. Bissell, W. H. Aspinwall, and the heirs of the late Lieut. MacArthur, letters were addressed to Capt. Bissell and Doctor Bowie as the representative of Lieut. MacArthur's heirs, asking the terms upon which the property could be purchased. These letters together with their answers, and other correspondence which ensued, as well as copies of the deeds, conveyances, etc. accompany this Report and are marked from A to N.

In the examination of these last, great doubts have arisen as to the legality of the original provisional grant made by Governor Jimeno to Victor Castro in 1840, and the fee simple granted by Governor Alverado, to the same, May 20th, 1841 and upon which are founded the rights of the present claimants. This deed sets forth that by authority vested in him (Alverado) he secures this Island to Castro and his heirs. It does not appear that any consideration monies have been paid for the same or consideration further demanded, than compliance with some formulae of law of which we know nothing.

The right of the Governor to make a conveyance in any form, is not apparent to us; on the contrary,

we are informed by gentlemen of the law, and other residents of California, presumed to be cognizant of the fact, that the central Mexican Government under a law inherited from its Spanish ancestry, reserved to its own use all headlands and islands in navigable waters for the purposes of defence &c. The facts in both cases, to wit: As to the right of Governor Alverado to convey public domain by fee simple, and the existence or non-existence of the law above referred to, it is presumed might best be ascertained by reference to the public archives of the Mexican Government.

The Board does not presume after the legal investigation had by its orders in California, to offer any opinion against such authority, that may have any great weight; still as these suggestions have been so frequently and so pointedly put before us, we cannot but deem it our duty to state, that we view with great caution, the legality of this chain of titles, and recommend, before any consummation of a purchase that a strict examination of the same be instituted.

It is proper to state, that in addition to the claimants above alluded to, there are several squatters already on the Island and holding possession. These persons stated, if the Government should claim the title to the Island, they would at once retire, but declared their determination to defend their titles against the claims of any individuals.

In concluding this Report, the Board cannot refrain from an expression of approbation of the prompt and efficient manner in which the duties

assigned to Lieut. Ammen and Act. Master Jackson have been performed by those officers.

All of which is respectfully submitted by your obedient servants.

John D. Sloat
Wm. S. Ogden, U. S. N.
Commissioner
Simon Mason Blunt, Lt. U. S. N.
W. P. S. Sanger, Civil Engineer

Washington City, D. C.
Nov. 6th, 1852.

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U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters, request that you will, as soon as possible, examine and inform them in whom is vested the true title to Mare Island.

The instructions from the Department to the Board are such as to require that your action should be as early as possible.

You will regard this communication as confidential.

Very respectfully
J. D. Sloat
Senior Officer of the Board

To
Calhoun Benham Esq.
U. S. District Attorney,
San Francisco, Cal.

U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters have been instructed to call upon you in relation to the military defence of such places as may otherwise be deemed favorable by them.

They request that you will give them your counsel in writing upon the capabilities, and the best plan of defence of Mare Island, as soon as may be practicable.

Very respectfully
J. D. Sloat
Senior officer of the Board

To
H. Wager Halleck
Capt. U. S. Engineers.

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San Francisco, California
July 1st, 1852

Com J. D. Sloat
Senior officer of the Board &c &c

Sir:

Your communication of June 24th asking "my opinion" upon the capabilities, and the best plan of "defence, of Mare Island" has been duly received.

In reply I would most respectfully state, that in my opinion all military works erected for the de-

fence of the Bay of San Francisco, should be located exterior to Mare Island and that any Barracks, Depots &c erected on that Island will be entirely within the line of fortifications and consequently perfectly secure from attack by a maritime force.

With respect to "the best plan of defence of the Island" itself, I can give no details of such "plan" without a more critical examination of the topography of the Island and of the soundings in its vicinity. I suppose however, that, at the present time, you only wish an opinion in general terms; and, from an acquaintance of many years with all the grounds in that vicinity, I feel prepared to say with much confidence, that Mare Island is admirably calculated for military defence, not only from its position, but also from its topographical character.

Very respectfully
Your obt servt
H. W. Halleck
Bvt. Capt. U. S. Engineers.

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U. S. Brig Major Eastland
San Francisco Bay July 23rd 1852

Sir:

The Board of Officers for locating a Naval Depot, having ascertained that the greater number of shares of Mare Island are vested in you, and being authorized to make a conditional purchase, subject to the satisfaction of the Secretary of the Navy, ask

you to give them in writing the conditions under which you are willing to sell your interest to the United States.

Very respectfully

J. D. Sloat

Senior Officer

G. W. P. Bissell Esq.

San Francisco, Cal.

A letter of like purport was also addressed to Dr. A. J. Bowie, representative of a supposed ownership of some shares.

San Francisco July 24 1852

Sir:

In answer to your letter dated the 23rd instant, I beg to say that I will sell my interest in "Mare Island" subject to the condition named, at the following rate, viz—$250 Two hundred & fifty dollars per acre, for that portion of the "Island" lying south of the main body of the tule or low ground and $50 Fifty dollars per acre for that portion lying north of the high or dry land, the first supposed to contain about nine hundred acres and the last about thirteen hundred acres.

Should you require the use of the "Island" before you can communicate with the Secretary of the Navy, a rent of $2000, two thousand dollars per month will be charged, with the proviso, that if the sale is approved of within three months from the date of the contract there will be no charge for rent.

Immediate possession of the whole Island can be

given, referring to the enclosed letter from Doctor Bowie relating to the interest he represents.

I am respectfully
Your obt Servt
G. W. P. Bissell

To Comn
John D. Sloat
Sen officer of the Board for
locating a Naval Depot
San Francisco.

San Francisco, July 24th, 1852.

Sir:

In reply to your letter asking the conditions upon which I am willing to sell the interest I represent in Mare Island, I have to state that the terms offered in the accompanying note from Mr. Bissell viz. two hundred and fifty dollars per acre, for the upland and fifty dollars for the tule will be accepted by me, subject however to ratification by Mrs. McArthur, as my power of attorney (although intended so) does not in the opinion of Chitwood & Co. confer fully the right to convey real estate.

I am very Respectfully etc.,
A. J. Bowie.

Com. Jno. D. Sloat, U. S. N.,
Senior officer of the Board.

U. S. Brig Major Eastland,
San Francisco, July 26th, 1852.

Sir:

The Commission appointed by the Honble Secretary of the Navy for the purpose of selecting a

site for a Navy Yard in these waters, has received your letter of the 24th inst. in reply to one of the 22nd of the same month in which you are requested to state the terms on which you would sell to the Government your interest in the locality known as "Mare Island."

The Commission takes leave to inform you that your proposition will be laid before the Honble Secretary of the Navy for his action, and regret to be obliged to add that its sense of duty will compel it in view of the vast disparity in prices asked, between this Island and other adjacent lands, and in view too of the estimate of its value as very recently held by its late proprietors, together with other considerations which need not be mentioned to recommend that the interests of the United States would not be served by becoming its purchaser.

Respectfully,

J. D. Sloat,

Senior officer of the Board.

To G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 26th, 1852.

Gentlemen:

I have just had the honor to receive your communication in reply to my proposition to sell to the United States "Mare Island" for a Naval Depot under date of the 24th inst. In entering upon a negotiation with the Commissioners at their request, I did not intend to preclude them (if my proposi-

tion should not be accepted) from making on their part such an one as they should deem it for the best interests of the Government to approve of, nor to have them consider the offer on my part as an ultimatum, and I now respectfully invite the Commissioners to name the sum that would be in accordance with their views, or to state if any other proposition from me will be entertained.

Respectfully,

Your obt servt,

G. W. P. Bissell.

Com. J. D. Sloat and officers forming the Board for selecting a Naval Depot, &c., &c.

U. S. Brig Major Eastland,
San Francisco, July 27th, 1852.

Sir:

In answer to your communication of yesterday's date, the Commission have to state, that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication, other than an invitation to the proprietors to present their terms of sale. If you deem it advisable to make any further proposals as an ultimatum the Commission will give it its respectful consideration.

Respectfully,

Your obt servt

John D. Sloat,
Senior officer of Board

To

G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 7th, 1852.

Gentlemen:

I have the honor to acknowledge the receipt of your letter of this date, in reply to my communication of yesterday inviting the board to propose such terms as they should deem fit for the purchase of "Mare Island."

The Commission states "that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication other than an invitation to the proprietors to present their terms of sale," being desirous that the government should not be disappointed in the possession of a place the Commission may deem most suitable to their purposes, and having reconsidered the matter and consulted with Doc Bowie who is interested in the Island, I now propose to sell our interest at the rate of $160,000 one hundred and sixty thousand dollars for the whole Island. Should the Board accept this proposition and close the contract here (subject to the approval of the Government within three months) immediate possession will be given and no charge for rent. Should however the board deem it not advisable to close the matter on these terms, I will empower Mr. W. H. Aspinwall of New York to negotiate with the Hon. Secretary of the Navy, and to arrange in Washington the whole matter on such terms as they shall mutually agree upon there.

I remain
Respectfully,
Your obt servtv,
G. W. P. Bissell.

To Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

U. S. Brig Major Eastland,
San Francisco, July 28, 1852.

Sir:

Your letter of the 27th inst has been received and the Board feeling that the terms you there propose are much higher than should be asked for the property in question, will not enter into any purchase but prefer laying the matter and your propositions before the Navy Department, with the same recommendation as is contained in their letter to you of the 26th inst.

Respectfully,
Your obt servt
J. D. Sloat,
Senior officer of the Board.

To
G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 29th, 1852.

Gentlemen:

I duly received your letter of yesterday wherein you say that you decline the purchase of "Mare Island" here, but will lay the whole matter before the Navy Department.

On looking over my letter to you of the 27th inst, I notice that I was not sufficiently explicit in that part of it where I speak of charging no rent. My meaning was, to offer the "Island" to the Government free of charge and without regard to future

negotiations for its purchase, for such reasonable time as they may require it.

Very Respectfully,

Your obt servt,

G. W. P. Bissell.

Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

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United States of America—Navy Department

I hereby certify that the annexed copy of Plan entitled "Plan for a Navy Yard at Mare Island, California" is a true copy of original plan No. 7 accompanying the report of the Board of Officers appointed to select a site for a Navy Yard in the Bay of San Francisco, California, dated November 6, 1852, on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,

Secretary.

[Maps and Plans accompanying this Exhibit are omitted by stipulation of counsel.]

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United States of America—Navy Department

I hereby certify that the annexed copy of a rough journal of the Board of Naval Officers appointed to

select a site for a Navy Yard on the Pacific Coast, showing a record of its proceedings from September 30, to October 23, 1852, both inclusive, is a true and literal exemplification of the record on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,
Secretary.

Rough Journal of the Naval Board in session at Washington, for completing their work upon the Bay of San Francisco, Cal.

Thursday, Septr. 30th, 1852:

The Board met according to appointment in the "Windee Building." All the members were present, namely: Com. J. D. Sloat, Commander Wm. S. Ogden, Lieut. S. F. Blunt and Wm. P. S. Sanger, Civil Engineer, also Lieut. Danl. Ammen and Acg Master A. C. Jackson, attached to the Board.

A letter directed to Com. Sloat from the Honble Secy. of the Navy, was read, bearing date the 20th of Sept. It referred to the Report to be made by the Board and called attention to the 3rd section of an enclosed Navy Appropriation Bill which was also read.

The Board discussed the plan of Mare Island and it was determined that a working one of one inch to the hundred feet should be made of the northwest part of the island and embracing as much of it as possible.

The Board discussed the subjects and generally the subject matter to be embraced in the body of the Report to be made to the Navy Department.

At half past twelve the Board adjourned.

Friday, October 1st:

Application by letter was made to the Secy of the Navy for the employment of a draftsman.

The subject discussed was the number of drawings and plans to be embraced in their Report. The following were deemed necessary:

1. Rincon Point and Mission Bay.
2. Saucelito.
3. Yerba Buena.
4. Raccoon Straits and Angel Island.
5. Aspinwall Bay.
6. Mare Island (general plan)
7. Mare Island 2nd plan (A)
8. do 3rd do (B)

At 1 the Board adjourned.

Saturday, October 3rd:

The Board met at 10 a. m. and there being nothing proposed for discussion, adjourned, to meet at the same hour on Monday.

Mr. Jackson employed in making the skeleton plan of Mare Island for projecting the improvements.

Monday, October 4th:

The Board met at 10 a. m. and nothing being proposed for discussion, adjourned. Mr. Jackson employed in making the skeleton plan of Mare Island.

Tuesday, October 5th:

The Board met at 10 a. m. and adjourned, there being nothing proposed for discussion. Mr. Jackson employed upon the skeleton plan of Mare Island.

Wednesday, October 6th:

The reply of Com. Skinner, Acg. Secy. of the Navy to a letter of Com. Sloat bearing date Oct. 1st, was received. It acceded to the request of the Board to employ a Topographical draftsman whose pay was not to exceed three dollars per day.

The Board met at 10 a. m. and nothing being proposed for discussion, adjourned. Mr. Jackson employed upon the working plan of Mare Island.

Thursday, October 7th:

The Board met at 10 a. m. and adjourned there being nothing proposed for discussion. Mr. Jackson employed in making the working plan of Mare Island.

Friday, October 8th:

The Board met ~~at 10 a. m.~~ and adjourned, there being nothing proposed for discussion. Mr. Jackson employed upon the working plan of Mare Island.

Tuesday, October 19th:

The Board met at 10 a. m. and discussed the manner of building the line of wharf and also deter-

mined that it should be straight and built as per plan between "T No. 12 and "H No. 54", forty two hundred feet in length. The location for floating Dry Dock was discussed also, but no place was determined upon. At one o'clock the Board adjourned.

20th:

The Board met at 10 a. m. The location of the floating Dry Dock and Basin and railway (if one be built) also the permanent Stone Dock and two ship houses were determined upon.

21st:

The Board met at the usual hour and were employed upon locating the improvements of the yard generally. The draftsman making smooth plans of the Surveys made.

22nd:

The same.

23rd:

The same.

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Mr. PECKHAM: We offer in evidence letter from Secretary of the Navy, dated February 9, 1853, requesting the reservation of Mare Island and President Fillmore's notation thereon, reserving Mare Island.

(The letters of February 9, 1853 and February 12, 1853, are received in evidence as "Plaintiff's Exhibit "H".)

## PLAINTIFF'S EXHIBIT H.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

July 10, 1931.

I hereby certify that the annexed copy of Executive Order, dated February 11, 1853, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. Parrott,
Acting Assistant Commissioner of the General Land Office.

Recorded in the California Letter book, 16 Feby., 1853.

JMM 1361756-1

Navy Department

February 9th, 1853.

Sir:

By the 3rd Section of the Act of last session, Chapter CIX Statutes at large, making appropriations for the Naval Service, the Secretary of the

Navy is "authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of Public Lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be found to exist in the United States or not, it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress above referred to authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San

Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your Obt. Servt.,

John P. Kennedy.

To the President.

Received and Posted in Vol. 55, p. 34. Nov. 24, 1923. A. E. "O."

Washington, February 11, 1853.

The Reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate Department, that the Reservation may be properly and legally recorded.

Millard Fillmore.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

July 10, 1931.

I hereby certify that the annexed copy of letter, dated February 12, 1853, filed under Mare Island Naval Reserve, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. Parrott,
Acting Assistant Commissioner of the
General Land Office.

Recorded in the California Letter book, 16 Feby., 1853.

JMM 254852-1a

Navy Department
February 12th, 1853.

Sir:

I have the honor to enclose herewith a letter addressed to the President from this Department under date of the 9th inst. asking him to give the necessary orders and to direct that the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily re-

puted to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved for public uses; And the President having made the reservation and instructed me to "communicate that fact to the appropriate Department, that the reservation may be properly and legally recorded" as will appear by his order of the 11th instant added by him to the letter from this Department herein before mentioned I respectfully request that the necessary order and notice may be given to effect the reservation of the said tract of land, known as Mare Island, in the Bay of San Francisco in California, and that this Department may be advised when the necessary forms shall be completed.

I have the honor to be

Very Respectfully,

Your Obt. St.,

John P. Kennedy.

Hon. A. H. H. Stewart,
Secretary of the Interior.

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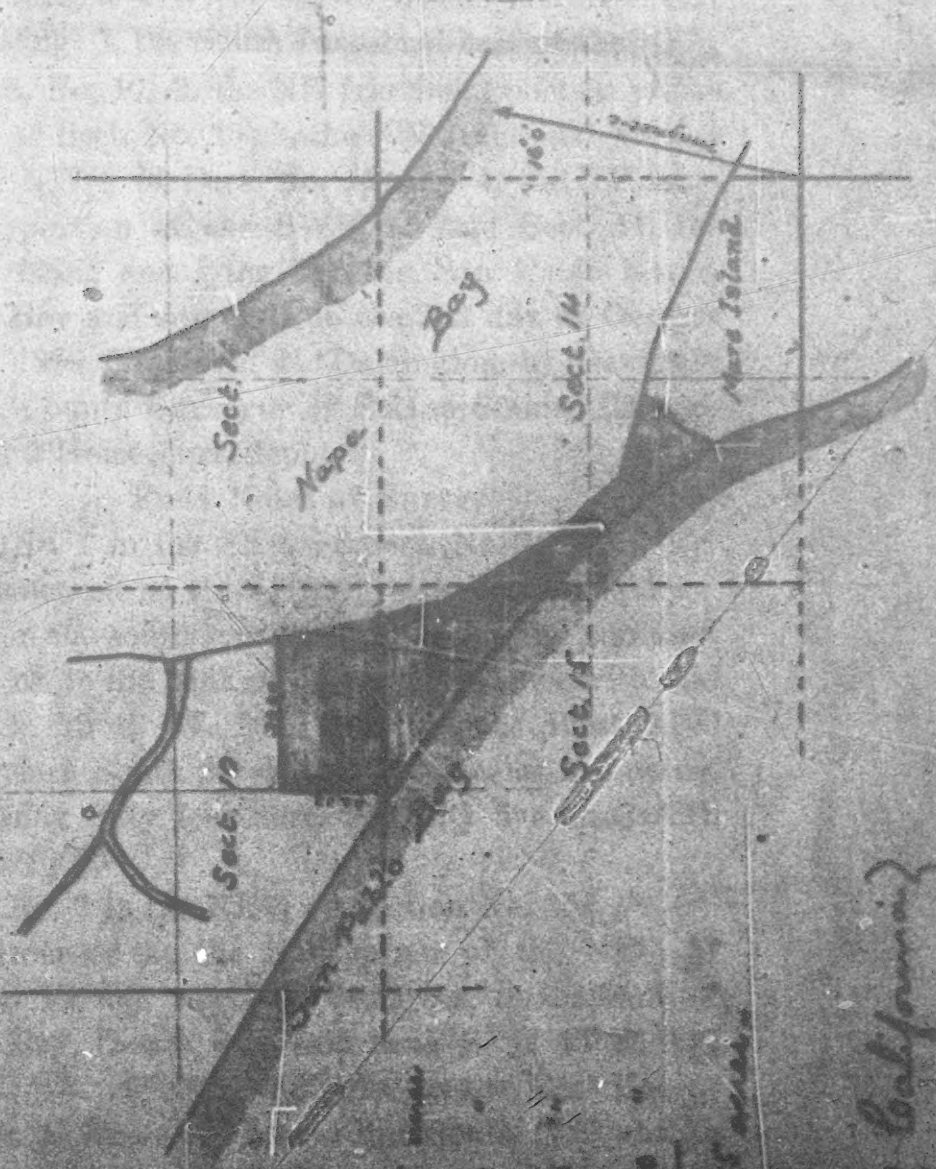
Mr. PECKHAM: We offer at this time from the record in Sawyer vs. Osterhaus case a certified copy of the Darlington Survey by Heindcourt.

(The certified copy of the Darlington Survey is received in evidence as "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT I. 384

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.



State of California,
County of Solano.

Survey No. 34 of Swamp and Overflowed lands in T. 3 N. R 4 W. of Monte Diablo meridian and base being: 1. the South fractional half of the SE¼ of Sect. No. 10; 2. the NE fractional portion of the NE¼ of Sect. No. 15; 3. the SW fractional portion of the NW¼ of Sect. No. 14; and 4. the NE fractional portion of the SW¼ of said Sect. 14, the whole being and lying between San Pablo Bay & Napa Bay and surveyed on the 2nd day of October A. D. 1856 for David N. Darlington, by David P. Wade, County Surveyor of Solano County through Em A. d'Hemecourt, deputy.

Field Notes of Survey.

Tract No. 1 in the SE¼ of Sect. No. 10:

Commenced at the ¼ Sect. stake on the ¼ Sect. stake on the south line of said Section and run East 34.55 chs. to the bank of Napa Bay; thence with said bank N. 12°45′ W. 20.51 chs.; thence West 30.00 chs. thence South 20 chs. to the place of beginning, containing sixty four acres and fifty five hundredth (64 55/100).

Tract No. 2 in the NE¼ of Section No. 15:

Commenced at the NW corner of the NE¼ of Section 15, and run East 34.55 chs. to the bank of Napa Bay, thence with said bank S. 12°45′ E. 9.17 chs. and S. 26° 0′ E. 7.82 chs. to the East line of Section 15 thence with said line South 17.37 chs. to the bank of San Pablo Bay, thence with the bank of said bay N. 45°0′ W. 6.62 chs. and N. 51°30′ W.

21.00 chs. and N. 54°30′ W. 19.00 chs. and N. 56°45′ W. 4.08 chs. to the ¼ section line thence with said line North 2.33 chs. to the place of beginning, containing Sixty two acres and forty hundredth (62 40/100).

Tract No. 3 in the NW¼ of Section 14:

Commenced at a point on the west line of said section distant 6.66 chs. North of the SW corner of the NW¼ of said section and run North 17.37 chs. to the bank of Napa Bay, thence with said bank S. 26°0′ E. 16.75 chs. and S. 43°10′ E. 12.30 chs. to the ¼ Sect. line thence with said line West 9.09 chs. to the bank of San Pablo Bay, thence with said bank N. 45°0′ W. 9.42 chs. to the place of beginning, containing thirteen acres and one tenth (13 1/10).

Tract No. 4 in the SW¼ of Section No. 14:

Commenced at a point on the E. and W. ¼ Section line in said Sect. distant 6.66 chs. East of the West line of said Section and run East 9.09 chs. to the bank of Napa Bay thence with said bank S. 43°10′ E. 8.78 chs. and S. 75°50′ E. 16.92 chs. to the base of the high land; thence with said base S. 42°30′ W. 10.00 chs. and S. 30°30′ W. 7.00 chs. to the bank of San Pablo Bay; thence with said bank N. 36°0′ W. 12.00 chs. and N. 45°0′ W. 19.96 chs. to the place of beginning, containing twenty four acres and one-half (24½).

The whole forming an area of one hundred and sixty four acres and fifty five hundredths (164 55/100) and having such shape and form as is fully delineated on the plat above, the variation of my compass being 16° East.

The whole being swamp and overflowed land to the full intent and meaning of an act of the legislature of this state intitled an act to provide for the disposal of the swamp and overflowed land belonging to this state, passed April 28th, 1855, and surveyed in accordance with the provisions of said act and the directions of the Surveyor General of the State of California.

In faith whereof I have hereto set my hand, Benicia this 10th day of October A. D. 1856.

David P. Wade,
County Surveyor, Solano County.
By Em A. d'Hemecourt,
Deputy.

State of California,
County of Solano—ss.

I, F. A. Steiger, County Surveyor of the County of Solano, State of California, do hereby certify the annexed and foregoing to be a full, true and correct copy of Survey Number Thirty-four (34) of Swamp and Overflowed Lands, as the same appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand this 21 day of July A. D. 1905.

F. A. Steiger,
County Surveyor.
Solano County, California.
By E. N. Eager, deputy.

State of California,
County of Solano—ss.

I, G. G. HALLIDAY, County Clerk of the County of Solano, State of California, and ex-offi-

cio Clerk of the Superior Court of said County, do hereby certify, that F. A. Steiger by E. N Eager, deputy, whose name is subscribed to the foregoing certificate, was, at the time of signing the same, and now is, the duly elected, qualified and acting County Surveyor of the County of Solano, State of California, and in custody of the records of said office, and full faith and credit are due to all his official acts as such. And I do further certify, that I am well acquainted with the handwriting of the said E. N. Eager and verily believe that the signature to the said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court, this 21st day of July A. D. 1905.

[Seal] G. G. Halliday,
County Clerk and ex-officio Clerk of the Superior Court.
By A. S. Halliday,
Dep. Co. Clerk.

Mr. PECKHAM: Also the patent from the State of California to Darlington, dated March 18, 1857, by F. Neeley Johnson, Governor, which is received in evidence as "Plaintiff's Exhibit "I-1".)

Mr. PECKHAM: We offer a certified copy of the deed from David N. Darlington to Rutherford Moody, dated June 6, 1859, purporting to remise, release, convey and confirm to Moody all of the interest of the grantor in two-sevenths undivided part of tract of land containing 164.55 acres, being on

Mare Island and described in the patent as described in the deed.

(The document was received in evidence as "Plaintiff's Exhibit "I-2".)

Mr. PECKHAM: We next offer from the record in the Sawyer vs. [178] Osterhaus case, original of the deed from David N. Darlington to Isaiah Hanscom, dated June 6, 1859, purporting to convey all of the right, title and interest of the grantor of one-seventh undivided part of the tract of land containing 164.55 acres, being on Mare Island, as described in the deed.

(Deed received in evidence as "Plaintiff's Exhibit "I-3.")

The following exhibits were next introduced by plaintiff and are described as follows:

"Exhibit I-4", deed from Darlington to Secor, dated June 6, 1855, purporting to convey grantor's right, title and interest in three-sevenths of the said 164.55 acres.

"Exhibit I-5", deed dated September 2, 1861, between Zeno Secor and Peter R. Kissam, of an undivided one-seventh part of the said 164.55 acres.

"Exhibit I-6", deed between Peter R. Kissam and Mary Ann Secor, quitclaiming to grantee undivided one-seventh part of said 164.55 acres.

Mr. PECKHAM: We offer a copy of the mandamus proceedings in the Court of Appeals for the District of Columbia, No. 4561, Hubert Work, as Secretary of the Interior, Appellant, vs. The

(Testimony of Frank E. Barker.)

United States of America, Ex rel. James E. O'Donnell, Appellee, which was received in evidence as "Plaintiff's Exhibit J".

Mr. PECKHAM: We offer a certified copy of the patent to the State of California of the land described in the Darlington Survey, (Document received in evidence as "Plaintiff's Exhibit K".)

WITNESS continuing: I have studied the patent of the United States Government to the State of California, covering and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34.

I have also studied the Survey made by Em. Ad. Hemecourt, Deputy of David P. Wade, of October 10, 1856, and I believe that the patent accords with that survey. I cannot locate the land de- [179] scribed in that patent and survey on any approved and accepted sectionized survey of the United States Land Office covering Mare Island. No approved and accepted sectionized survey of that particular tract by the United States Land Office exists. No such legal subdivisions as are found in that patent exist on any official, approved and accepted sectionized survey of Township 3 North, Range 4 West, Mount Diablo Base and Meridian. I do not have in my office any record of the approval by the United States Surveyor General for California of Swamp and Overflowed Segregation Survey No. 34. I do not find in my office any Township Plat constructed or approved, showing thereupon Swamp and Overflow Survey 34. I do not find any record

(Testimony of Frank E. Barker.)

of the forwarding of such constructed, approved Township Plats to the General Land Office.

Referring to "Plaintiff's Exhibits A and B", being the Dyer and Joy Surveys, these two are the only approved and accepted sectionized surveys of Township 3 North, Range 4 West, Mount Diablo Base and Meridian.

Referring to "Plaintiff's Exhibit A", which is dated March 4, 1863, the line surrounding Mare Island, as shown on that map, is not a surveyed line and I do not find any indication of courses or distances on that line, or places of commencement that would enable a surveyor to pick them up and run them out at a later date. There is nothing on that line in the nature of engineering data which would enable a surveyor to pick it up and run it.

I have made a search for the correspondence and the chart accompanying it for the reservation of Mare Island in 1853 and have not been able to find it. I presume it was burned in the fire of 1906. I have also made a search for the original records of the Freeman Survey and the correspondence relating thereto and contemporaneous therewith, but have been unable to find it. I presume it also was burned in the fire of 1906.

I have been with the United States Survey Office under the [180] United States Surveyor General from 1906 to the present time and I have been Chief of that office since March, 1926. I believe I am familiar with the rules, procedure and practices of that office with respect to surveys.

(Testimony of Frank E. Barker.)

Q: I will show you a copy of a notice that was printed by Surveyor General Rollins in the "Alta California", reciting the completion of and return of the Freeman Survey, and I will ask you if, according to the rules, practices and usages of your office, Rollins would have published that notice if he had not approved the survey therein mentioned.

Mr. KELBY: Object to the question on the ground that it is placing a construction upon regulations that are not produced here and as to which the regulations themselves are the best evidence; as to whether or not a particular officer of the United States would or would not do something is beyond the ken of the witness.

The COURT: Objection overruled and exception. You may answer.

A: I do not believe, from my experience, that this notice would have been published in the paper unless the Surveyor General had been satisfied with the survey as made by Freeman.

Mr. KELBY: I move that the answer of the witness be stricken out for the reason that it is incompetent.

The COURT: It may go out.

Mr. PECKHAM: Exception.

The COURT: Denied and exception.

Mr. PECKHAM: May the records show that the testimony just given by the witness related to Government's Exhibit Y. I will show you on Government's Exhibit Z a copy of the letter from General

Ames to Williamson, Commissioner of the Land Office, transmitting the tracing and on account of Freeman, and I will ask you if that voucher would have been O. K.'d and transmitted and the tracing transmitted if the Surveyor General Ames did not approve the Freeman Survey.

Mr. KELBY: I object to that, on the ground that it is clear- [181] ly incompetent, calling for the conclusion of the witness.

The COURT: Sustained.

Mr. PECKHAM: To which we except, if your Honor please, with all respect.

Q: From your knowledge of the rules, regulations and practices of the Land Office can you state whether or not the Surveyor General would have authorized the payment of a Deputy Surveyor making a survey if he did not approve the survey.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

A: If the Surveyor General were not satisfied with the survey, in my opinion he would not have transmitted the account for payment of the survey.

Mr. KELBY: I move that the answer of the witness be stricken out on the ground that it is clearly incompetent.

The COURT: Denied and exception.

Mr. PECKHAM: Q. I show you from Government's Exhibit Z the certificate of Surveyor General Ames dated January 18, 1858, reciting publication of the notice of the completion and return of the Freeman survey between the dates, I believe, of October 11 and November 10; will you examine

that and state whether or not from your knowledge of the practice, usages and regulations of the Interior Department, Land Office, Surveyor General Ames would have made that certificate if he had disapproved the Freeman survey?

Mr. KELBY: Objected to as incompetent, calling for the conclusion of this witness.

The COURT: It surely does call for the witness' conclusion.

Mr. PECKHAM: I know it does.

The COURT: I do not see how that testimony aids the Court.

Mr. PECKHAM: Because the original records have been burned in the fire and we are trying to get at the probabilities of the case.

The COURT: Might not the Court conclude that? [182]

Mr. PECKHAM: I think the Court could.

The COURT: How then would the Court be aided by the testimony of this witness?

Mr. PECKHAM: This witness, after all of these years in the Land Office, has knowledge of the practices, usages and regulations of the office.

The COURT: Overruled and exception.

A: I do not believe that Surveyor General Ames would have made this certificate if he had not been satisfied with the survey as made by Freeman.

Mr. KELBY: It is moved that the answer of the witness be stricken as incompetent.

The COURT: Denied and exception.

Mr. PECKHAM: Q: Mr. Barker, from your knowledge of the practices, usages and customs of

the Land Office, would Surveyor General Ames have made that certificate without note of a protest if a protest had in fact been filed by that date?

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

A: Well, I am not so sure about that. He might have received a protest and certify that this had been advertised.

Mr. PECKHAM: Q: If he had received such a protest what would he have done?

Mr. KELBY: I object to that as calling for the conclusion of the witness; incompetent.

The COURT: Overruled and exception.

A: He would have forwarded the protest to the Commissioner of the General Land Office with the return of the survey for the information of the Commissioner.

Mr. PECKHAM: Q: That would have been his duty? I believe so.

Q: It would also have been his duty, would it not, to have given his opinion upon the protest? [183]

Mr. KELBY: Objected to for the same reasons already stated.

The COURT: Overruled and exception.

A: Probably if he were satisfied with the return of the survey, the return would have spoken for itself as to the protest, that is, his answer.

Mr. KELBY: I move that the answer be stricken out as incompetent.

The COURT: Denied and exception. [184]

## TESTIMONY OF ALFRED MODESTO SOBIERALSKI,

A Witness for Plaintiff.

I am commissioned by the President, Hydrographic and Geodetic Engineer, Coast and Geodetic Survey. I am a member of the Committee on Topographic and Hydrographic Survey of the American Society of Civil Engineers. I am a Civil Engineer, Surveyor and Map-Maker. I am also a member of the Committee on Airplane Surveys and a member of the American Technical Standards Committee of Surveys and Maps and am also Assistant Chief of the Division of Charts in the Coast and Geodetic Survey. As such Assistant Chief of the Division of Charts, I have direct custody of all of the surveys made by the Coast and Geodetic Surveys since earliest times. All surveys and published charts being made at present pass through my hands for verification. My verification and review consist of thirty-five hydrographic engineers who take original field records received in the office and verify all details which we are able to verify from any notes or reports which are submitted with the records. The earliest topographical survey made by the Coast Survey are dated 1835 and I have all the surveys made by our Bureau under my custody. All questions regarding interpretation of any of the earlier surveys are referred to me. Ever since I graduated from College, in 1908, I have done work in the field in the matter of coast and geodetic surveys. I have made a great many surveys in various parts of the

(Testimony of Alfred Modesto Sobieralski.)

United States and its possessions. My position is generally examining and interpreting surveys.

The document now shown to me I recognize as a copy of a map in the Library of Congress in Washington. It is a survey by Ayala in 1775 and is a chart of San Francisco Bay. The reference on the map to the Spanish name Bahia Redonda is well known to be the earlier name of the San Pablo Bay, the area of which I will outline with red pencil. Carquinez Straits is easily identified on this map by its resemblance to the present map of that area. The area which [185] corresponds to Mare Island is indicated on the map as a long, flat area of unbroken continuity from a point which corresponds to Mare Island Straits to a large stream some distance to the westward.

Referring to the San Pablo shore line, there is no indication of a water course breaking the continuity of this shore line. There is no indication of a water course connecting Mare Island Straits with San Pablo Bay.

Q. Do you find anything on that map that indicates the map-maker's description of Mare Island.

A. The letter "V", applied to this area, refers to a note which says: "Isla Plana", which has been translated as "an island of the plains, or flat land".

(The map of 1775 is received in evidence as "Plaintiff's Exhibit L-1".)

WITNESS continuing: The document now shown me is a map of San Francisco Bay, a copy of which

(Testimony of Alfred Modesto Sobieralski.)

is in the Library of Congress at Washington. The date assigned to the map by the Library of Congress was 1803 and is certified by the Library of Congress. The area corresponding to San Pablo Bay, on which is easily read the Spanish name "Bahia Redonda", shows an entrance of an outlet corresponding to Carquinez Straits, and to the westward of that entrance another body of water heading toward the north, which should be identified as Mare Island Strait, or Napa River. There is a long, narrow body of land connected to the northward by a very narrow strip of land and this by the differentiation of the symbols on the map is represented as a low, flat area extending from Mare Island Straits along the whole northern shore of San Pablo Bay, which represents the land area that is now known as Mare Island and is represented as an area of land of unbroken continuity from Mare Island Straits westward to the large stream or body of water surrounding it. There is no indication of a water-way in connection with Mare Island Straits or San Pablo Bay. [186]

(The document was received in evidence as "Plaintiff's Exhibit L-2".)

WITNESS continuing: The document now shown to me is a copy of the Spanish map in the Library of Congress and certified to be a true copy. The map covers San Francisco Bay and at the northerly entrance it shows an area corresponding

(Testimony of Alfred Modesto Sobieralski.)

with San Pablo Bay, at the northeast corner of which is a passage corresponding to Carquinez Straits, leading into a large body of water corresponding to Suisun Bay. To the westward of the entrance of Carqinez Straits is a body of water extending northwesterly which would correspond to Mare Island Straits and Napa River. I find on the map an area of unbroken land extending from this point which I have described as the entrance to Mare Island Straits, which corresponds to the Mare Island area. There is no water-way depicted on the map connecting Mare Island Straits with San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-3".)

WITNESS continuing: The document now shown me is a copy of an original Spanish map in the Library of Congress and is dated 1781. It is a plan of a port of San Francisco and covers the whole area of San Francisco Bay and extends up into the waters of the Sacramento River. San Pablo Bay is indicated by the area marked "H" on the map. I find on the map at the northeast shore of the bay a large area of land extending from a point separated from the entrance to Carqinez Straits by a body of water and extending northwestward towards another large stream. There is an unbroken shore line between the two points. There is no water-way of any kind indicated between what cor-

(Testimony of Alfred Modesto Sobieralski.)

responds to Mare Island Straits and San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-4".)

WITNESS continuing: The original of the document now shown me is a very elaborately engraved map in the Library of Congress, the title of which says: "Plan of the Port of San Francisco", published in Mexico in 1825. San Pablo Bay can be recognized by the resemblance to the present map of San Pablo Bay.

Referring to the northeast shore of San Pablo Bay, there is a body of water corresponding to Mare Island Straits and Napa River, the shore line extending from Napa River to a large stream or river to the westward. There is a contiguous shore line from the entrance to Mare Island Straits to this large river to the westward. There is no representation of any stream crossing from the vicinity of Mare Island Straits to San Pablo Bay.

(The document was offered in evidence as "Plaintiff's Exhibit L-5".)

WITNESS continuing: The document now shown to me is a copy of a map in the archives of Coast and Geodetic Survey, printed in England, I believe, in 1798. There is on the map a representation of an area which corresponds to the present map of San Pablo Bay. At the northeast shore of San Pablo Bay, as represented on this map, is a body of water just westward of Carquinez Straits which

(Testimony of Alfred Modesto Sobieralski.)

would correspond to Mare Island Straits. There is no island indicated on this map which corresponds to Mare Island. There is an unbroken shore line from the entrance to Mare Island Straits to a large stream to the westward which is a continuous shore line all along the northeast shore of San Pablo Bay. There is no evidence on the map of a stream or water-way connecting San Pablo Bay with Mare Island Straits or Napa River. "G. G. & J. Robinson, Pater-noster Row, London," were map printers in England.

Mr. BURKE: I might save time, if your Honor please. I am willing to stipulate that the Government *that the Government* can produce a hundred additional maps of similar character. This is making a tremendous record. I am willing to stipulate that they have a hundred of such maps, Spanish maps, English maps, and French maps, [188] and they are all of identical character, showing an unbroken shore line from Carquinez Straits to Sonoma Creek. That is all he can prove ultimately by these exhibits, even if they are competent. It is only building up a record that is very lengthy.

Mr. PECKHAM: If your Honor please, our purpose in doing this is to show the permanent character of that unbroken shore line, and that it was never crossed by a stream since recorded history began and maps began to be made of it, that Mare Island is all one block of land.

(Testimony of Alfred Modesto Sobieralski.)

(The document was received in evidence as "Plaintiff's Exhibit L-6-A".)

WITNESS continuing: The document now shown me is a copy of a map in the archives in the Coast and Geodetic Survey, published by A. Dalrymple, who was a British hydrographer and map publisher. His maps were used by the British Navy. The map indicates San Pablo Bay somewhat similar to the present map of San Pablo Bay and shows Carquinez Straits and a body of water corresponding to Mare Island Straits. The northeast shore of the San Pablo Bay, extending from Mare Island Straits to a large river to the westward is shown as an unbroken shore line and the body of land so represented is shown to be continuous. There is no stream connecting San Pablo Bay with Mare Island Straits.

(The document was offered in evidence as "Plaintiff's Exhibit L-6-A".)

The exhibit now shown me is an Admiralty Chart of San Francisco Harbor, printed at the Hydrographic Office of the British Admiralty, surveyed by Captain F. W. Beechey, 1827-8, who was Captain in the Royal Navy. The document depicts San Pablo Bay; and Mare Island Straits is shown in much the same position as is shown on the present chart. Along the northeast shore of San Pablo Bay and the Mare Island area is an unbroken stretch of shore line from Mare Island Straits, extending westward to a small stream some distance [189] to the westward. The map only goes a

(Testimony of Alfred Modesto Sobieralski.)

short distance up Mare Island Straits, but in the area shown, there is no break in the shore line. There are several small streams shown draining into Mare Lsland Straits, but there is no stream connecting Mare Island Straits with San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-7".)

WITNESS continuing: The document now shown me is an engraving from a copper plate in the archives of the Coast and Geodetic Survey. The title of the map is "Map of Sacramento River and Bay of San Pablo with Harbor of San Francisco by the U. S. Exploring Expedition, 1841", of which Wilkes was in command. Mare Island Straits is shown at the northeast shore of San Pablo Bay and there are soundings on the map, indicating that they had actually been in that area and taken these soundings.

Referring to the northeast shore of San Pablo Bay, the shore line of this section of Mare Island is indicated in a solid line and is unbroken from Mare Island Straits to a stream which can be plainly recognized as Sonoma Creek. There is no evidence of any waterway connecting San Pablo Bay with Mare Island Straits. There is no island indicated on the map. It is indicated as an unbroken shore line from along the shore of San Pablo Bay from Mare Island Straits to Sonoma Creek; the northern limits of such area are not shown. The difference between the present map and Beechey's survey (L-7) is that in this map they have extended the

(Testimony of Alfred Modesto Sobieralski.)

representation of Napa River or Mare Island Straits further north than Beechey's survey shows it and have also soundings in Sonoma Creek that Beechey had indicated in a sketchy area.

(The document was received in evidence as "Plaintiff's Exhibit L-8".)

WITNESS continuing: The document shown me is a copy of a map that is in the Library of Congress from the surveys of John Charles [190] Fremont, and the map is a section of a larger map covering the Coast of California. San Pablo Bay is represented on this map and Mare Island Straits is indicated as a body of water extending up from San Pablo Bay northwardly. The area corresponding to Mare Island can be recognized and extends from Mare Island Straits westward along the north shore of San Pablo Bay. There is no evidence of a waterway connecting Mare Island Straits with San Pablo Bay. There is no break in the continuity of the shore line or a body of water that corresponds to the Mare Island Straits over to the large stream in the northwest part of San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-8-A".)

WITNESS continuing: The document now shown me is a copy of a map in the Library of Congress, entitled: "A correct map from actual surveys and examinations embracing a portion of California between Monterey and the Prairie Buttes, Marysville Buttes," drawn by Stuart, who was a hydrographer with the U. S. Exploring Expedition and later col-

(Testimony of Alfred Modesto Sobieralski.)

laborated with Ringgold in maps of San Francisco Bay. The Bay of San Pablo is shown on the chart, and Mare Island Straits is shown connected with Napa River, extending to the northward. From the entrance to the Mare Island Straits the land extends northwestward to a stream which is undoubtedly Sonoma Creek. The shore line of San Pablo Bay between the entrance to Mare Island Straits and the entrance to the creek to the west is shown on the map as an unbroken shore line between those two points. There is no indication of a water-way connecting San Pablo Bay with Mare Island Straits.

(The document was received in evidence as "Plaintiff's Exhibit L-8-B".)

WITNESS continuing: The document now shown me is a copy of the map in the archives in the Coast and Geodetic Survey, entitled: "Sketch of General Riley's Route through the Mining Districts, dated 1849, copied from the original sketch by Lt. Derby in the Office [191] of the Tenth Military Department, by J. McH. Hollingsworth, Assistant." Riley was Military Governor of California. The map shows an island extending from the entrance to Carquinez Straits separated from the land to the northward by a body of water extending over to Sonoma Creek. It is indicated as a continuous body of land from the two points I have mentioned. There is no stream of water crossing this body of land from what corresponds to the entrance of Mare Island Straits to Sonoma Creek.

(Testimony of Alfred Modesto Sobieralski.)

(The document was received in evidence as "Plaintiff's Exhibit L-9".)

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, entitled: "New Map of the Gold Rush in California, by Charles Drayton Gibbes, from his own and other recent surveys and explorations, dated 1851." Mare Island Straits and Napa River are indicated on this map by name and there is no evidence of a stream of water connecting Napa River with San Pablo Bay. The land is of unbroken continuity from the entrance to Mare Island Straits along the north shore of San Pablo Bay to Sonoma Creek.

(The document was received in evidence as "Plaintiff's Exhibit L-10.")

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, entitled: "Chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco, California, by Cadwalader Ringgold," who was a Naval Officer who made surveys and published maps of San Francisco in 1850. He was later sent on important survey expeditions by the Hydrographic Office of the Navy. There is a large island extending from a point opposite Vallejo for a considerable distance up Napa River and a narrow body of water connecting Napa River, but none shown connecting Napa River with San Pablo Bay, except the one heretofore mentioned. The San Pablo Bay shore line of this body of [192]

(Testimony of Alfred Modesto Sobieralski.)

land between the entrance to Sonoma Creek and Mare Island Straits is unbroken.

(The document was received in evidence as "Plaintiff's Exhibit L-11".)

WITNESS continuing: The document now shown me is a copy of a map published by Cadwalader Ringgold, the original being in the archives of the Coast and Geodetic Survey. The map represents Suisun and Vallejo Bays with the confluence of the Rivers Sacramento and San Joaquin.

Mr. PECKHAM: If your Honor please, this, we believe, was one of the charts that went in with the Sloat Board Report. To make the report of the Sloat Board complete, it may be necessary to refer to it.

Mr. BURKE: I do not concede, however, that that is the chart referred to in the Sloat Board.

(The document was received in evidence as "Plaintiff's Exhibit L-12".)

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, showing entrance to the Bay of San Francisco, Bays of San Francisco and San Pablo, Straits of Carquinez and Suisun Bay, and the Sacramento and San Joaquin Rivers, by Cadwalader Ringgold, dated 1850, who was then a Commander in the United States Navy. There is an island indicated extending from the entrance of Napa Creek to Sonoma River. The shore line from Sonoma Creek eastward to Mare Island Straits is

(Testimony of Alfred Modesto Sobieralski.)

shown unbroken. There is no indication of a water course in that area. I find no indication of the northeast shore of San Pablo Bay being intersected by a water-way connecting Mare Island with San Pablo Bay except one that connects Napa River with Sonoma River well to the northward of the Town of Vallejo. In a map of this kind, covering such a large area, it would be an enormous undertaking to survey all the area covered and it is customary to consult the best authorities available and make some surveys if the means [193] are available. At the time, 1850, it was in the time of the gold rush and there were no charts of this area available and the business men of San Francisco whose names appear on the map had confidence in Ringgold as a map publisher and requested him to prepare and order this map, which was the best chart available at that time.

(The document was received in evidence as "Plaintiff's Exhibit L-13.")

WITNESS continuing: The document now shown me is a copy of a map which was published in the Coast and Geodetic Survey Report for 1850 and is entitled: "Sketch 'J', showing the progress of the Bay of San Francisco, California," dated 1850, made by Coast and Geodetic Survey. The area along San Pablo Bay from Mare Island Straits westward to Sonoma Creek is shown unbroken by any stream or water-way and has a continuous land area. There is also shown to me a similar sketch, "J-2", published with the report of the Superin-

(Testimony of Alfred Modesto Sobieralski.)

tendent of the Coast and Geodetic Survey for 1852, which shows the shore line of San Pablo Bay between Mare Island Straits and Sonoma Creek is continuous and shows no water-way breaking the continuity of this shore line.

(The document was received in evidence as "Plaintiff's Exhibit L-13-A".)

WITNESS continuing: There are several triangulation stations along that shore which indicate that those have been visited and occupied by the surveyors.

(The document was received in evidence as "Plaintiff's Exhibit L-13-B".)

WITNESS continuing: The document now shown me is a copy on the same scale as the original survey by the Coast and Geodetic Survey, of Mare Island Straits, dated 1849, designated in our records as Register No. 236. The heavy dark line running from southeast to northwest across the map indicates the shore line which, in our work, had always been considered the mean high water line. The first brok- [194] en, dotted line to the east of that out toward the middle of Mare Island Straits indicates the plane of reference to the work which, in this case, is the mean low water and is a submarine contour showing that plane and indicates that the area inside of that line between that line and the high water line was exposed at low water. The numbers inside of the low water line are the reduced soundings which are actual soundings minus the correction for the time of the tide at the time and when preceded by a minus sign they indicate

(Testimony of Alfred Modesto Sobieralski.)

elevations which the bottom will bear when tide stands at low water. With respect to the stopping of these numbers or line of soundings at the heavy dark line, representing the Mare Island shore, the boats, in taking the soundings, if they had not encountered some barrier, would have continued the soundings on down beyond and if that line were covered at high water, the soundings would have been carried across that line. The fact that the continuity of the low water mark, as shown on the map, is so regular would indicate it is not very probable that there was any water-way across there.

(The document was received in evidence as "Plaintiff's Exhibit L-14".)

WITNESS continuing: Referring to "Plaintiff's Exhibit L-14", the line on the neck of the Isthmus opposite the northernmost horizontal line of the figures "Mare Island Signal" mean that there was a station there of some kind which surveyors used in determining their position in taking soundings. The structure is usually some sixteen or twenty feet high and a fairly substantial structure, and if any dry land were available, it is constructed there rather than in shoal water. The point on the map which is represented by the letter "X" represents where the Machine Shop is. The signal called "Mare Island", using the scale that is shown on the map, is 1300 meters or approximately three-quarters of a mile north of the Machine Shop, indicated by the letter "X". The phrase shown on the map, "Triangulation by J. S. Williams, Assistant U. S. C. S.

(Testimony of Alfred Modesto Sobieralski.)

and [195] S. F. Blunt, Lieutenant U. S. N.", indicates that the survey was determined in a survey that had been made before control by triangulation, which means accurate measurement of the distance between points which were used to control triangulation. S. F. Blunt was a Naval Officer who was assigned to work in the Coast Survey, and also collaborated with Ringgold in preparing maps of San Francisco Bay, and also had some connection with the Commission for selection of fortifications and naval site, which is the Smith Board.

(The letter from Col. Smith, of the Smith Board, was received in evidence as "Plaintiff's Exhibit L-15.")

WITNESS continuing: The document now shown me is a topographical survey made by A. D. Bache, by R. D. Cutts. Cutts was an officer of the Coast and Geodetic Survey, the date of which is 1851. The cross-hatching on the Isthmus at the north end of Mare Island indicates wet land of Mare Island. The heavy black line on the west side of that cross-hatching represents the shore line which, in the work of the Coast and Geodetic Survey, has always been considered the nearest approximation which can be made to the mean high water line. However, the black line at the east side of the Isthmus represents a shore line, the nearest approximation to the mean high water line. The dotted, broken line to the west of the Isthmus represents the mean low water line or the limit to

(Testimony of Alfred Modesto Sobieralski.)

which the land was exposed at low water. The broken or dotted line to the east of the Isthmus indicates the low water line along the Mare Island Straits side of the Island and the significance of the break in the heavy dotted line represents the high water line on the east and west sides of the Isthmus, indicates the limits of the survey, that the survey did not extend beyond that point.

Referring to the regularity of the low water line on the San Pablo side of Mare Island and also the low water line on the Mare Island Straits side of the Isthmus, if a surveyor saw this area [196] bare at low water and if there had been a water course, he would have shown it on his map. In addition to that, the regularity of the lines indicates the improbability of any stream. If there was a stream or water course connecting San Pablo Bay with Mare Island Straits, at that point, it would have produced an indentation of the low water line on each side and what I have said about the dark line on the Isthmus is also true of the dark line dividing the cross-hatched portion from the White portion of the Mare Island Straits further down on the map. Within the limits of this survey, it shows that the land area to the northward is continuous. This map carries north of the present Machine Shop at Mare Island approximately 1800 feet. The Isthmus, according to the high water line that is indicated, is 150 meters wide, which would be close to 500 feet, which is the width of the peninsula at its narrowest point, according to the map. The dis-

(Testimony of Alfred Modesto Sobieralski.)

tance on this map between the low water line on the Mare Island Straits side and the San Pablo side is 910 meters, which is about 2957 feet. According to this map, this is the width of the Peninsula at its narrowest point at low tide.

The representation in white, on the tule area at the northeast of Mare Island, as depicted on the map, indicates a small pond and I do not see how there could be any pond if the area was not above high water.

(The document was received in evidence as "Plaintiff's Exhibit L-16".)

WITNESS continuing: The document now shown me is a chart of the Mare Island Straits, published by the Coast and Geodetic Survey. The difference between a chart and a survey is that a chart is a compilation from a survey and in compiling our charts during those years, we used nothing but our own surveys. This is the first chart of this area published and, as is said in the title, is from the survey by McArthur and Cutts, which were present.

Mr. BURKE: In other words, the previous plats and charts are unsurveyed.

A: Not by the Coast and Geodetic Survey.

Q: They were not surveyed by the Coast and Geodetic Survey? [197]

A: This is the first chart published of this area.

Mr. BURKE: That is my understanding, that is the first survey that was made.

(Testimony of Alfred Modesto Sobieralski.)

Mr. PECKHAM: Just a moment.

Q: Was this the first survey that was made of that area?

A: .This is not a survey, this is a chart, and in the title are references to the surveys from which it was compiled, and those surveys have been presented to me for comment.

Q: Was this Cutts map a survey?

A: That is an actual survey.

Q: Government's Exhibit L-16 was an actual survey?

A: Yes.

Q: And this is a map or chart made from the survey?

A: You can see the scale of this is much smaller than a usual survey.

(The document was received in evidence as "Plaintiff's Exhibit L-17".)

WITNESS continuing: The document now shown me is a full scale copy of the original survey made by Rodgers, of the Coast and Geodetic Survey in 1850. Rodgers was an officer of the Coast and Geodetic Survey, who made a complete survey of San Francisco Bay. Before making this survey he had surveyed all of the southerly part of San Francisco Bay, including all of the marsh land bordering the shore. I have handled a great deal of his work and compared it with more recent surveys and have found his work unusually accurate, dependable and complete. The dark line dividing

(Testimony of Alfred Modesto Sobieralski.)

the cross-hatching from the white, between Mare Island Navy Yard and the northernmost limits of the map on the San Pablo side represents the shore line which, as I said before, the Coast Survey has always tried to approximate the mean high water line. The similar dark line at the east side of the cross-hatched portion is also the shore line on the Napa Creek side. The broken or dotted line to the west of the [198] San Pablo shore line represents the mean low water line. The dotted line on the east side of Mare Island on the Napa Strait side represents the low water line on the Napa Creek side. The part of the shore line from San Pablo Bay to Napa Strait, as indicated on this map, is unbroken by any stream. There is no stream crossing the Isthmus, connecting Napa Straits with San Pablo Bay. The broken wavy line at the south end of the cross-hatched section represents the dividing line between the marsh land and highland to the southward of it. The map indicates that the land adjoining the high land is continuous within the limits of this map along the shore of San Pablo Bay.

Mr. BURKE: Might I ask a question? What do you mean by high land?

A. I happen to have seen—

Q. (Interrupting) In speaking of that map, what do you mean by high land?

A. It is a relative term. In this case I am referring to the area which is covered by contours.

Q. I am asking you what is the meaning of high land? Do you mean the high water mark, or do you mean the line of the uplands?

(Testimony of Alfred Modesto Sobieralski.)

A. That line that I have just spoken about now. What I consider high land there is land that is considerably above high water, a considerable elevation above high water.

Q. Isn't this line that I indicate here—may I put a mark on it, an "X"?—isn't that line over there, around there, down to San Pablo Bay, the line of uplands of this body of land which is marked "Mare Island"?

A. You will have to explain what you mean by upland.

Q. You are an expert, I ask you if that is the line of uplands.

A. That is a dividing line between marsh land and land of another character.

Q. What is the land of the other character?

A. It is not indicated. [199]

Q. In other words, you say it is not the line of the uplands between Mare Island and this line, here?

A. Until you specify what you mean by "upland", it is not a term which was used—

Q. (Interrupting) Well, then, high land, what is high land as distinguished from low land at the sea level?

A. I would say land that is above the most extreme tide would be called high land. That is my application of the term.

Q. Your definition of upland is land—

A. Not upland.

(Testimony of Alfred Modesto Sobieralski.)

Q. That high land is not land that is just above the ordinary high water mark?

A. Yes.

Q. Suppose it was two inches above ordinary high water mark?

Mr. PECKHAM: I submit the witness ought to have a chance to explain.

Mr. BURKE: Suppose this land was six inches, or, put it this way, this land was .67 of a foot above the high water mark, would that be high land?

A. It would be land above mean high water.

Q. Would it be upland?

Mr. PECKHAM: The witness has said he does not know what you are talking about when you say "upland".

Mr. BURKE: Your own report calls it upland.

The COURT: Do you want to add anything to your answer?

A. No, I think I have answered the question.

(The document was received in evidence as "Plaintiff's Exhibit L-18".)

WITNESS continuing: Referring to Exhibit "L-18", the shore line from Boat Cut-Off to the place where the Navy Yard is now located is broken by a few small sloughs draining the land toward Napa Creek, but no water-way traversing the land from Napa Creek to San Pablo Bay. There are no streams draining toward San Pablo Bay. All of the streams drain toward Napa Creek. This indicates that the land bordering San Pablo Bay must have

(Testimony of Alfred Modesto Sobieralski.)

been high enough to cause a drainage in one direction. [200]

Referring to the line marked "X" by Mr. Burke, and to the line that is marked "Y", immediately to the east of the high land of Mare Island, the two lines represent the same condition, a dividing line between land of two different characters and, as I read the map, the two different characters are on one side of the land indicated as "marsh" and on the other it is land which is called high land in a term of reference distinguishing it from marsh land.

There is no water-way which connects Napa Creek with San Pablo Bay. The San Pablo Bay low water line is unbroken and very regular in shape, indicating that there could be no water-way entering from San Pablo Bay. As far north as Boat Cut-Off, low water line is also very regular, indicating that no stream could enter; and the sharp change in direction in the vicinity of Boat Cut-Off is of a character which would have been shown if there had been some water-way crossing from Napa Creek to San Pablo Bay.

The significance of the ending of the lines of the cross-hatching and the line of the high water line, as well as the line of boundary of Navy Yard Slough at the left-hand corner of the map is that it is the limit of the survey on this sheet. The white spots in the middle of the cross-hatching indicate small ponds. I have seen the original of this map. On the

(Testimony of Alfred Modesto Sobieralski.)

original map there is a coloring and also on "Exhibit L-16". The original of the document which I am testifying about has light blue coloring in a small area which is indicated "white" on the copy about which I am testifying and is invariably used both by the Coast and Geodetic Survey and other organizations to indicate water and corresponds to the water in the Mare Island Straits and San Pablo Bay.

WITNESS continuing: The document now shown to me is a photographic copy of Coast and Geodetic Survey plane table sheets, surveyed by plane table method, dated 1856. By a plane table survey, the man has an instrument on which he takes this original sheet into the field, makes his measurements and directions actual- [201] ly on the ground and draws them to scale on this original sheet; that is the record which he has on file in the office. The man has actually traversed all this area and made frequent measurements at distances and directions. The document which is shown to me is a continuation of "Exhibit L-18". To the westward there is no indication of a break in the shore line from the point where this survey joins "Exhibit L-18" to Sonoma Creek. The tide land on the Bay side of that shore line indicates the low water line and its regularity, continuity indicates the impossibility of any water-way cutting this shore line. The heavy black line bounding the cross-hatched section of the map along the northwest shore of San

(Testimony of Alfred Modesto Sobieralski.)

Pablo Bay is the delineation of the shore line which, in the Coast and Geodetic Survey practice is the nearest approximation which the surveyor can make to mean high water line. The plane table surveys are made exactly the same way now as they were made in 1856. The markings on the present surveys are comparable to ones made in 1858. They are, as far as I can see on this map, the same symbols and character of work used at present.

(The document was received in evidence as "Plaintiff's Exhibit L-19".)

WITNESS continuing: The document now shown to me is a hydrographic survey by the Coast and Geodetic Survey, dated 1856, made by a party under the command of James Alden, who was one of our best hydrographers at the time and his name has been perpetuated in the name of Alden Banks, off the Coast of California, and several other geographical features. A hydrographic survey is a survey of the water area and is for the guidance of mariners and one of the first requirements of a hydrographic survey is the delineation of the shore line is considered the mean high water line. A topographical survey is a survey of the area inside of the high water line.

Q. Is there any difference in the essential requirements of [202] a hydrographic map and a topographical map, as to the showing of the line at mean high water?

A. In the course of the hydrographic survey, the surveyor approaches the shore very frequently,

(Testimony of Alfred Modesto Sobieralski.)

as may be seen by the soundings here and he is able to see the shore line and one of the requirements of his work is that he have a record of the stage of the tide so that every time he goes near shore he knows at what stage of the tide he is approaching the shore. There are several thousand soundings shown on the map. I might further state that in determining his position when approaching the shore line, he uses entirely different methods from what the topographical surveyor used. He takes the angles to points located on the opposite shore which correspond to measure the distance from those marked points on the opposite shore, so that where he has determined his distance from the opposite shore and locates the shore adjacent to his position in this method, any discrepancy in the topographical survey would immediately become apparent to him.

WITNESS continuing: There is no indication of a water-way connecting Mare Island Straits with San Pablo Bay. The dotted or stippled line to eastward on the Mare Island Straits side of the Isthmus of Mare Island is a mean low water line. The fact that the low water line is regular and that the area has been covered by soundings precludes the possibility of a water-way through that area. In this area the soundings are all indicated as zero, that is, at the period of low water, but I have examined actual records of the soundings and found that on this sheet the hydrographer considered that the mariner would not be interested in any soundings

(Testimony of Alfred Modesto Sobieralski.)

inside the low water line. As indicated, they are zero. The actual record of the soundings, which I believe is in the following exhibit, gives the actual depths in there, which show elevations up to three and four feet above the plane of reference. [203]

The COURT: Q. That is all shallow water around there, isn't it?

A. Yes.

Mr. PECKHAM: Q. All tide flats?

A. Inside of the low water line—of course, at low water there is no water line, it is all bare. The line marked "X" on the map is the dividing line of two characters, the marsh on one side and the line which I call higher land, to distinguish it from marsh land on the other side. The mark "Y", opposite a similar line on the east side of Mare Island is also a dividing line between land which is in character marsh land on one side and higher land on the other side.

The document now shown to me is a photostatic copy of a sheet accompanying this survey, which shows actual soundings which I have previously mentioned as being recorded on the sheet as shallow limits and are from the actual record of the survey made at this time. They are the soundings between the low water line and high water line and they indicate that at low water this bottom was bare to the elevation shown by the minus figures. The minus means that its depth is a negative quantity. It is higher than mean low water.

(Testimony of Alfred Modesto Sobieralski.)

Q. At the shore can you tell us about what the depth above mean low water is?

A. The first one is 1.4 feet, and as we progress to the northward 2.8 feet, 2.7 feet, and at the entrance to Boat Cut-Off 4.8 feet.

The COURT: What is the Boat Cut-Off?

A. That is the name of the slough where the machine shop now stands.

Q. Which way?

A. Northwestward.

Mr. PECKHAM: Q. That is the stream that is indicated as Boat Cut-Off on "Plaintiff's Exhibit L-19"?

A. The name appears on Exhibit L-18.

Q. Have you scaled L-18?

A. Yes.

Q. What is the width of the isthmus at high water at its [204] narrowest place, as measured on L-18?

A. The width of the Isthmus between the high water line on the San Pablo Bay side and the high water line on the Mare Island Straits side is 496 feet.

Q. What is the width at low water at the narrowest point of the Isthmus?

A. The distance between the low water line on the San Pablo Bay side and the low water line on the Mare Island Straits side at its narrowest point, which is closest to the position of the present machine shop is 2812 feet.

(Testimony of Alfred Modesto Sobierajski.)

Q. Does this photostat that you have just been referring to indicate the land stations of the hydrographic surveyor in making these surveys?

A. Yes, the stations are indicated both on the original sheet and on this accompanying sheet.

Mr. PECKHAM: I offer this in evidence as Government's Exhibit L-19.

Q. I hand you this document and ask you what this is?

A. This is a photostatic copy of the notes of record accompanying the survey, which is marked L-20.

Mr. PECKHAM: May we offer the chart of Alden as Government's Exhibit L-20, the photostat of the chart of the low water soundings between high and low water as Government's Exhibit L-21, and the notes of the survey of Alden as Government's Exhibit L-22.

(The documents were marked, respectively, "Plaintiff's Exhibits L-20-21 and 22".)

WITNESS continuing: Referring to the field notes of that survey, the station marked 2-A is about 100 feet to the northwestward of the present Machine Shop, and opposite the angles locating its position, he gives the soundings of two feet, tidal reducer of 4.4, which means that was the height of the tide at that time above the plane of reference, and he makes the note: "End of line at tule shore of Mare Island", which means that boats could not proceed any further; that there was a barrier there beyond which he could not proceed. Station No. 8-A is approximately half a mile north- [205] west-

(Testimony of Alfred Modesto Sobieralski.)

ward of the point occupied by the Machine Shop. It is recorded as April 29, 1856, and note opposite the position of the sounding tidal reducer states: "At tule" and indicates that there was not water sufficient to float the boat or obtain any sounding beyond that point. The entry of the surveyor for Station 7-A is: "End of line on beach." The position of 7-A is still further to the northward about five-eighths of a mile north from a point where the machine shop now stands and indicates that it was impossible to proceed any further.

Station 16-E, shown on the map dated May 5, 1856, are angles for determining the position of soundings and tidal reducer of 5.7 feet, meaning that the tide was 5.7 feet above the plane of reference or the plane of mean low water. The note says: "At tule shore of Mare Island" and indicates there was a barrier beyond which it could not proceed.

Q. What can you say as to the comparison of the height of tide as indicated on that date of 5.7 feet above mean lower low water and the plane of mean high water at that point?

A. That is approximately the best determination of height—I mean high water. I believe it is 5.8 feet above the same plane that is used for reference. Station 16-E is at the entrance to Boat Cut-Off on the Mare Island Strait side and approximately one and one-quarter nautical miles northwesterly of the machine shop at Mare Island. A nautical mile is one and one-eighth times a statute mile.

(Testimony of Alfred Modesto Sobieralski.)

Station 3-C is practically the same position as Station 16-E, that is, one and three-eighths statute miles from the high line of Mare Island. From the field notes of the survey, 3-C is May 2, 1856. At this position were recorded soundings, angles for determining the position and the tidal reducer, and the note: "End of line Boat on shore." The position 20-E on the photostat is also at the entrance to the Boat Cut-Off, being the south entrance. On 20-E May 5, 1856, he records the soundings, angles for determining the position and [206] the tidal reducer, and this note: "Ends at tule shore Mare Island." 20-E is approximately one and three-eighths miles northwest of the point occupied by the machine shop. The figures I have given for 20-E. are practically the same as position 3-C and 16-E.

WITNESS continuing: The document now shown to me is a chart of Mare Island Straits, covered by the Coast and Geodetic Survey and compiled from surveys by R. D. Cutts and A. F. Rodgers and James Alden, and is a compilation of the surveys previously introduced by R. D. Cutts, Captain Rodgers and Captain Alden. The solid dark line along the east side of the cross-hatched portion is the shore line corresponding to the mean high water line and the heavy black line on the San Pablo side of the cross-hatched section indicates shore line corresponding to the mean high water line. The black stippled or dotted area to the east of the Isthmus, between the machine shop and the entrance to Boat Cut-Off represents the low water

(Testimony of Alfred Modesto Sobieralski.)

line and corresponds to the area which we have just been discussing, which is the tide flat area which bares at low water.

Referring to a similar stippled or dotted area on the San Pablo Bay side of the Isthmus, this represents the low water line on the San Pablo Bay shore and the area between the high water line on the San Pablo Bay shore; and the low water line indicates that this area is exposed at low water. There is no water-way indicated on this map connecting Mare Island Straits with San Pablo Bay. Within the limits of this map there is unbroken continuity between the high line at the southerly end of Mare Island and the limits of the map. The regularity of the configuration of low water line indicates the improbability of any water-way connecting Mare Island Straits with San Pablo Bay in this area. The chart is printed from a copper plate in the possession of and archives of the Coast and Geodetic Survey.

(The document was received in evidence as "Plaintiff's Exhibit L-13".) [207]

WITNESS continuing: The document now shown to me is a photograph copy of a chart of Petaluma and Napa Creek, furnished by the Coast and Geodetic Survey in 1861. The inset appearing on the map is to be read in connection with the rest of the map and is a continuation of Napa Creek. Within the limits of the map there is no indication of a water-way crossing the Isthmus, connecting Napa Creek with San Pablo Bay. Along

(Testimony of Alfred Modesto Sobieralski.)

the San Pablo shore, between the area occupied by the Navy Yard and the limits of the chart, the shore line is unbroken by any stream or water-way. The stippled or shaded area to the east of the peninsula, between the machine shop point and Boat Cut-Off represents low water line and the area that is colored by the stippling is exposed at low water. The low water line is very regular in configuration and shows no indication of the probability of a water-way extending across the neck of land.

(The document was received in evidence as "Plaintiff's Exhibit L-24".)

WITNESS continuing: The document now shown to me is a print from a copper plate of a Coast Survey Chart of San Pablo Bay, dated 1863. The solid line along the edge of the cross-hatched area indicates the shore line or the mean high water line. The dark line to the west of the cross-hatched section on the San Pablo side of the island or Isthmus indicates the mean high water line, extending from the area now occupied by the Navy Yard to Sonoma Creek. The high water line is unbroken and there is no indication of a water-way connecting Mare Island Straits with San Pablo Bay. There is no indication of a water-way along the east side of the Isthmus of Mare Island. The area represented by a dark stippled portion or dotted portion directly to the east of that high water line along the east side of the Isthmus is the area as exposed at low water. A similar area on the west side of the Isthmus represents shore area which is exposed at

(Testimony of Alfred Modesto Sobieralski.)

low water. The lighter stippled area to the westward of the last-named area represents the area between low water line and [208] the six-foot contour, between the low water line and the one fathom line. The continuity of the tide flat on the east side of Mare Island at the Isthmus and between the machine shop point and Boat Cut-Off indicates the improbability of any water-way. The continuity of the stippled or dotted portion represents the west side of the tide flats on the west side of the Isthmus and indicates no water-way along that area. The area between low water line and the one fathom curve indicates a shoaling from the northward and no deduction can be drawn from the direction of that line, but the deduction can be drawn solely from the continuance and regularity of the low water line and the tide flat area.

(The document was received in evidence as "Plaintiff's Exhibit L-25".)

WITNESS continuing: The document now shown to me is a photostatic reproduction of a hydrographic survey by the Coast and Geodetic Survey, dated 1876. It is a check-up and amplification of the original survey of Alden Hydrographic Survey on a larger scale. There is no indication of a water-way connecting Mare Island Straits and San Pablo Bay. There is no indication of a water-way along the San Pablo shore connecting with Mare Island Straits. The broken, dotted line nearest to the shore line on the east side of the isthmus repre-

(Testimony of Alfred Modesto Sobieralski.)

sents the low water line. The regularity of that low water line indicates the improbability of any water-way connecting Mare Island Straits and San Pablo Bay. The line which has been marked "X" indicates the dividing line between land of two different characters, swamp land and higher land. The line marked "Y" indicates the dividing line between land of two different characters, the same as the other line. The dotted line on the map indicates the low water line to the northwestward. The line indicated by "Y" is the shore line of this area.

(The document was received in evidence as "Plaintiff's Exhibit L-26".) [209]

WITNESS continuing: The document now shown to me is a photographic copy by full scale of an original survey made in October and November, 1883, by the Coast and Geodetic Survey. The line on the east side of Mare Island ends at the entrance of Boat Cut-Off. The heavy dark lines along the east side of the peninsula represent the shore line of the mean high water line. The cross-hatched area to the eastward of that represents vegetation outside of the high water line and indicates that the marsh grasses have grown toward Mare Island Straits. The heavy black line at the west side of the Isthmus indicates the mean high water line. The cross-hatched portion to the west of that indicates vegetation or grass which sometimes grows outside of the mean high water line. The heavy black line on the west side of the Isthmus represents mean high

(Testimony of Alfred Modesto Sobieralski.)

water line. There is no indication of a stream in this area between mean high water line on the west side of the Isthmus from the high line of Mare Island to the end of the map crossing from San Pablo Bay to Mare Island Straits. Between Boat Cut-Off and the Machine Shop, there is no stream that crosses from Mare Island Straits to San Pablo Bay. If there were any water-way, the surveyor would have indicated it. The heavy, black, wavy line between the cross-hatched section, the light cross-hatched section of the Isthmus and the main body of high land indicates the dividing line between land of two different characters, which is indicated by two different symbols. To the north of the line it is indicated as "wet land" and to the south of it as "grass". A similar black line on the east side of the section, indicated as grass opposite the City of Vallejo, indicates the dividing line between the marsh land and the area covered by grass. The marsh land to the northward of the Machine Shop bears the same relation to the grass land as the marsh land indicated to the eastward of the grass land.

(The document was received in evidence as "Plaintiff's Exhibit L-27".) [210]

WITNESS continuing: The document now shown me is a copy of the Coast and Geodetic Survey Map of Mare Island Straits, dated March, 1916. The cross-hatched section on the Isthmus portion of Mare Island indicates marsh land or wet land. The

(Testimony of Alfred Modesto Sobieralski.)

cross-hatched section to the east of the peninsula is also marsh land. A long line straight to an angle and then straight north and south between Boat Cut-Off and a point down toward the high land of Mare Island, as shown on this document and from its configuration I would assume that it was a ditch artificially cut by a dredge. The proximity of the long dredged channel to the dyke, indicated on the map, conveys to my mind that probably the material for constructing that dyke was obtained from the dredged channel. I do not find that condition on any previous map of Mare Island. The white portion of the map along the Isthmus of Mare Island from the high land to the end of the map indicates that the land is higher and dryer than the area as shown as marsh land. The continuity of the land in the peninsula section with the high land of Mare Island indicates there is no stream separating the land to the northward of the Machine Shop from the area occupied by the Navy Yard. There are several streams entering the Mare Island Straits and draining the land, but none which goes all the way across Mare Island Straits to San Pablo Bay, and that is true of the entire distance from Boat Cut-Off to Machine Shop Point.

(The document was received in evidence as "Plaintiff's Exhibit L-28".)

Witness continuing:

Mr. BURKE: Might I ask the witness a question?

(Testimony of Alfred Modesto Sobieralski.)

Q. Throughout your testimony you have used the word "marsh". Do you mean by that salt marsh?

A. We make no distinction between fresh water and salt water marsh. I use the term in the general sense of land which occasionally is wet.

Q. You have answered my question.

Mr. PECKHAM: I submit the witness has a right to explain. Have you anything else you want to add to your answer?

A. No. [211]

WITNESS continuing: The document now shown to me is a copy of a chart of San Pablo Bay, published by the Coast and Geodetic Survey, dated January, 1915, Catalogue No. 5533. The heavy black line on the San Pablo Bay side of Mare Island represents the shore line or what we consider mean high water line. A similar heavy black line on the east side of Mare Island from the entrance to Mare Island Strait to the entrance of Navy Yard Slough indicated on the map represents the shore line or the mean high water line. The stippled area or broken line area to the eastward of Mare Island Strait side of that high water line represents area which is exposed at low water. The stippled or dotted area to the west and southwest of the San Pablo Shore of Mare Island represents the low water line of the area which is exposed at low water. There is no water-way in this area, connecting Napa Creek with San Pablo Bay. The white section of Mare Island delineated on this map indicates that the land is dry. There is no break in the

(Testimony of Alfred Modesto Sobieralski.)

continuity of the land from the area occupied by the Navy Yard to Sonoma Creek. The words: "Mare Island" on the high land of the Island signifies that the name follows local custom. The words: "Island No. 1" at the north end of Mare Island indicates the local name but does not attempt to define the limits to which that name is to be applied.

I have examined the records of our chart instructions and find that in 1903 a note by the man who made the drawing for the chart of that date, in which he stated that amendments were made in this area, principally dykes and roads, from geological survey quadrangles, and in explanation of the use of those charts he says that we had only one survey in this area, the Coast and Geodetic Survey, and the Geological Survey had a recent one made. Among the factors which he applied were roads and dykes and the name of the newly reclaimed area. Island No. 1 and Tubbs Island were the names so applied, from the statement of the record. The statement in the record shows that this was his application of local people's names to [212] newly reclaimed land in the northerly area of Mare Island. The name Island No. 1, appearing in a chart which was prepared in 1903, the document concerning which I am testifying, is a reprint of the chart of 1903. The name "Island No. 1" was a name which was applied and put on the chart merely for identification.

(The document was received in evidence as "Plaintiff's Exhibit L-29".)

(Testimony of Alfred Modesto Sobieralski.)

WITNESS continuing: The document now shown to me is a copy of the same chart, No. 5533, published by the Coast and Geodetic Survey and corrected to June 30, 1931. The names "Island No. 1 and Island No. 2" do not appear on this chart. There is no indication of a water-way between the points where it joins Sonoma Creek and the southerly end of the high land of a water-way connecting Napa River with San Pablo Bay; and my testimony would be the same between this point and the south end of the Island. There is no water-way, as indicated on this map, in the area traversing Mare Island from Napa River, between the entrance of Boat Cut-Off or Dutchman's Slough and the south end of the Island. This document is the latest official map of the Coast and Geodetic Survey. The name "Island No. 1," to the north of Mare Island was removed from our chart of 1922 on receipt of better information. The names "Island No. 1 and Island No. 2" have never appeared on any of our surveys. The only thing I can say as to the basis, if any, which the map-maker had to put it on the map was that a surveyor made an attempt to obtain local names and from some authority obtained these designations which he placed on this map.

(The document was received in evidence as "Plaintiff's Exhibit L-30".)

WITNESS continuing: Comparing the two last exhibits, the appearance of San Pablo Bay in the shape of a crescent indicates that it has been subject to wave action and that wave action and [213] the

(Testimony of Alfred Modesto Sobieralski.)

other processes, due to deposits and erosion have come to an equilibrium, a state of balance, indicating a degree of permanence to that area. Our earlier surveys of this area indicate that such a state of balance or equilibrium between eroding and upbuilding forces existed in the past and the condition, I think, is due to the preservation of a state of balance or equilibrium between the destructive forces of the waves and the upbuilding forces of the current.

In my work, I come in contact with members of the Beach Erosion Board, particularly the expert members of the Board, such as Professor Faville, Professor Johnson and Mr. Jelineau, who are authorities on the theory of shore processes, and in the designing and construction of works for the preservation of beaches; and I think practically most of their investigations and designs are based on data furnished by the United States Coast and Geodetic Survey.

Q. From a perusal of those authorities, can you state what official charts were available to the Smith Board of the charts that have been introduced—what were available to the Smith Board in 1850?

A. Of the official charts, none except the map by Fremont, and such maps as have been covered.

Q. Would the Beechey chart have been available, the chart of the British Admiralty?

A. Yes.

Q. Would the Wilkes chart have been available to them?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. Would the Ringgold charts have been available to them?

A. I am not sure of the date of that.

Q. Would the Cutts chart have been available to them?

A. I don't know anything about the date of the board which you mention.

Q. The Smith Board, I believe, was organized in the early part of 1850. The Smith Board report has already been put in evidence.

Mr. BURKE: He evidently don't know what the Smith Board was.

Mr. PECKHAM: Q. Do you recall that the Smith Board was a Board that was formed to report on fortifications on the Western Coast, here?

A. Yes. I have handled some correspondence from [214] Colonel Smith, who was chairman of this board, but I don't remember the date.

Mr. PECKHAM: I believe the board reported on March 3, 1850, did it not, Mr. Burke?

Mr. BURKE: I think about that date. But I don't see how he had any correspondence.

A. I handled copies of that correspondence.

Mr. PECKHAM: Q. Do you know of any other official charts than those that would have been available to that board?

A. There were no official charts available at that time.

Q. The only charts that would have been available to them are the charts that have been introduced here of that date, or prior to that date. Is that correct?

A. That is of the official charts?

(Testimony of Alfred Modesto Sobieralski.)

Q. Yes.

A. Yes.

Q. The same thing would be true as to the report of the Sloat Board in 1852, that the only charts that would have been available to them would be the charts that have been introduced in evidence here as of that date or previous to that date?

A. That is, of 1852 the only charts that were available of any kind were the Beechey chart, the Wilkes chart, and the Ringgold charts.

Mr. PECKHAM: Take the witness.

Cross-Examination by Mr. Burke.

Captain Beechey was a hydrographer in the British Navy, and at the time this survey was made, he was under orders to continue Vancouver surveys, but through some accident or other, he was held at San Francisco, and during that time made surveys.

The Wilkes Survey was made under authority of Congress, the President and the Navy Department, in the year 1841. I do not know of any authority that Ringgold had for making his report. I am forty-nine years of age. I first made acquaintance with the lands in controversy about three days ago. All my knowledge of the vicinity and of the islands and matters that I have testified to comes from maps.

Q. So all your knowledge of the vicinity and of the islands and matters that you have testified to come not from any personal knowledge of your own?

A. They come from the map. [215]

Q. I asked you if they come from any personal knowledge of your own?

(Testimony of Alfred Modesto Sobieralski.)

A. Personal knowledge of maps.

Q. Of your own?

A. My contact with the maps.

Q. Let us be frank; you have no knowledge of the subject matter of these surveys, except such as you have gleaned from reports and archives extending back to the year 1723, or something like that, have you?

A. Well, my handling of these maps in comparison with other maps has certainly given me a personal knowledge of the character of the work.

Q. Do you call information from maps in archives knowledge?

A. I think so.

WITNESS continuing: In my previous testimony where I have stated and reiterated that none of the maps, charts, or plats, officially, or otherwise, indicate the presence of any water-way traversing the land in controversy from Napa Creek to San Pablo Bay, I was using the generally accepted term of water-way, which is any body of water or stream which would be long and narrow. A body of water would have to be long and narrow to be a water-way, as distinguished from a river or some other stream. The term "stream" generally presupposes running water. There is no definite limit that has ever been set by any authority as to the width it must be in order to be a stream. In my definition of the term "water-way" and "stream", I do not wish to be understood as saying it must be navigable water. I should say that any water-way or stream which left a visible bed would cover my use of the term, and

(Testimony of Alfred Modesto Sobieralski.)

would certainly imply mean high water at the plane of mean high water. I would not want to be quoted as an authority as to whether overflow land within the definition of Mr. Justice Field was either a water course or a stream—I am an authority only on maps. I believe the accepted definition of "tide land" is the area between low water and mean high water mark. I am not an expert on tide lands. The definition of "salt marsh" as being the extension of "tide land" agrees [216] with my idea of what salt marsh is, except that I believe there is a distinction between marsh and tide land coming in as a matter of relative position to the tidal plane. From my own knowledge, I would say the high water mark at Mare Island is 5.8 feet above the plane of mean lower low water. The Coast and Geodetic Survey considers ordinary high tide the plane of mean high water. A neap tide and a spring tide is a tide occurring twice a month. What we consider the mean high water line is the average of all the high water tides over a long period of time, generally considered, for a good determination, nineteen years. One could determine the plan of high water within varying degrees to precision by a comparatively short observation, but the longer the observation, the more accurate the determination of the plane. High tide passing over the surface of the flat overflowed land would indicate the point that it reached possibly by debris and drift wood and various deposits of that kind. I would not consider the presence of drift wood on a flat surface .65 of a foot above the ordinary high water mark as a limit of the ordinary

(Testimony of Alfred Modesto Sobieralski.)

high tide. In land that is vertical, the Coast Survey sometimes used the markings of the height of the tide, but official instructions specify that the surveyor should carefully study the tide and the appearance of the land before using such a method and giving them approximate methods for determining the plane of high water with relation to the plane of the tide at any time. If there was a stream or body of water when the tide stood at mean high water between the high land or the upland mark of Mare Island and another point to the north sufficient to permit a duck to swim from Napa Creek to San Pablo Bay, I am sure it would have been shown on the survey of that area. I know what tules are. My experience has been that they usually grow around fresh water. I would not consider that a body of water across the northern boundary of Mare Island from San Pablo Bay to Napa Creek was a waterway or a stream just from the fact that tules grew in it. I have never seen tules growing in [217] dry land. In the letter handed me by Mr. Burke, received by him from Director Patton of the Coast Survey, he specifies 6.1 feet above the datum of mean lower low water at *Mayor* Island and specifies the mean higher high water above the same datum as 6.6 feet. Extraordinary high water, what we term extreme high water would arise only at some unusual condition of wind and possibly floods or some other unusual circumstances. The higher high water would not be designated as extraordinary high water. [218]

When I stated with respect to "Plaintiff's Ex-

(Testimony of Alfred Modesto Sobieralski.)

hibit L-" that the designations "Island No. 1 and Mare Island" had been placed upon those plats by reason of local name, it might have been an arbitrary designation by a surveyor. It is also stated in the record that the names Island No. 1 and Island No. 2 were applied to a newly reclaimed area. It is not a fact that Island No. 1 is here designated before it was reclaimed at all; the same time that the name Island No. 1 was applied, the dykes were applied to the map. When I applied my theory to the specific instance of Island No. 1, I am quoting the record of the compilation of this chart which was compiled in 1903 and published some time afterwards.

Q. Have you read the report of the Cadastral Engineer, Francis E. Joy, who made the report under which these two tracts of land, 5, 6, and 9, and 34, were patented to the State of California?

A. I have not. I am not interested in those surveys. I am only interpreting the surveys made by the Coast and Geodetic Survey.

Q. I am going to read a small portion of that report to you, and I am going to ask you to interpret it under the same theory that you interpreted the maps beginning 1723 down to the map of 1931: "The portion of this fractional township east of the main channel of Napa River (not including lands previously surveyed), and all of that portion lying west of Napa River and North of Tract No. 38, Mare Island Navy Yard, is hereby returned as

(Testimony of Alfred Modesto Sobieralski.)

swamp and overflow within the meaning of the Swamp Act of September 28, 1850. West of the main channel of Napa River I have surveyed the land in two bodies, one of which I have termed 'Island No. 1 and Mare Island', the second and smaller is covered by portions of sections 3, 4, 5, 9, and 10." Now would it be your idea that Mr. Joy so designated these same tracts of land in the year 1923 by reason of their local reputation, or because they had been called by the inhabitants of the vicinity as Island No. 1 or Island No. 2, or because he found, under his investigation as civil engineer to determine swamp and overflow qual- [219] ity of land, that there were two islands, namely, Island No. 1 and Mare Island? Now is it your interpretation of that report that he designated those tracts as Island No. 1 and Mare Island by reason of their local reputation, or by reason of their ancient history?

A. As I said before, he appears to apply those names arbitrarily for designation the tracts of land; I do not think there is any evidence in the report that he had any authority either way. He states that he designated one section as Island No. 1, and the other as Island No. 2.

Q. Assuming that he did apply them arbitrarily, he might have called one the Irish Republic and the other the Good See, but the fact that they are two islands would remain.

A. I do not think he made the statement they are two islands.

(Testimony of Alfred Modesto Sobieralski.)

Q. Do you think he would go to work and take one island extending from Carquinez Straits to Sonoma Creek and say it was two islands?

A. That has been done. We have any number of charts which show names of two islands.

Q. There was not two names on this island, was there?

A. There was while Island No. 1 was on the chart, yes.

Q. We will pass the Joy report and we will take the certified plat of Township 4, Range 3M. Mount Diablo, which is this portion that I show you here of Survey 569, that is of Solano County, and is included in Napa County.

Mr. BURKE: What is your interpretation of the reason that the official surveyor of the United States delegated to ascertain and determine the character of this land designated this area as Island No. 1?

A. The only thing I can see that he did was to designate that area to distinguish it from some other area.

WITNESS continuing: If the map of the official surveyor of the United States showed water-ways or streams bounding the area which he called an island, there would not be any difficulty about distinguishing these two terms from a stream. From my interpreta- [220] tion of the maps extending back to 1723, there is an area north of Mare Island of what we indicate on our charts as marsh land along the east side of what is now the "Navy Yard", which

(Testimony of Alfred Modesto Sobieralski.)

is analogous to the land to the northerly. I will say that the maps from 1851 on all show an area of marsh land along the east side of what is now the Navy Yard that is of the same character as the land to the northerly, including all land northerly of what is now Mare Island Navy Yard. It is my idea that the land, the swamp and overflow land on the easterly side of Mare Island were identical in character with the lands northerly, extending northerly from the Machine Shop. I have read the second executive order reserving Mare Island, together with appendages of tule and marsh ordinarily reported to belong to Mare Island and I would say that it is all land extending from the Machine Shop bounded by the mean high water line and this area that I spoke of before along the east side. I can point out on the Map of 1856 the appendages of tule and marsh belonging to Mare Island. I interpret that phrase to mean along the mean high water line along the south shore of this area extending to Sonoma Creek, and then whatever is determined as ordinary high water line following the mean high water line back to Napa River.

As far as the interpretation of the map of the Coast Survey is concerned, we do not attempt to make a classification of whether an area is swamp and overflow. If some authority decides it is swamp overflow land, it would not affect our maps.

Referring to the so-called Bissell Conveyance of Mare Island, including all tule land, low land or

(Testimony of Alfred Modesto Sobieralski.)

marsh land claimed to belong or ever claimed to have belonged to Mare Island, I would interpret a statement of that kind as including the area bounded by the mean high water line along San Pablo Bay to the first creek or stream or water-way which indents that shore and meantime following the high water line back to Napa River and that would apply to the line on the easterly side of Mare Island as swamp and overflow land out [221] to the left. I have not been called on to interpret the words "appendages of land." If you want my personal opinion, I would say that it brings up the idea of low land attached to some higher land. I think that there is a conveyance of Mare Island including tule land and marsh. My idea of the word "including" is that it is a term put in to clarify the definition of Mare Island.

Referring to the Spanish Maps: I find an analogy in the tule line of the lands, whatever they were, which were depicted upon those ancient maps. They are analogous to Mare Island in that they depict an unbroken area of shore line—an unbroken stretch of shore line, from the vicinity of what is now Mare Island Straits to the first large stream to the westward.

Q. Is it your idea that if there are a number of these exhibits here that are produced by the Government showing what you interpret to be a continuously unbroken body of water, they are more valuable than are the Coast Surveys made by your Department, or by the Interior Department, that

(Testimony of Alfred Modesto Sobieralski.)

show an intervening space between Island No. 1 and 34? If you do not understand the question, I will illustrate by handing you the United States Geological Survey, issued by the Department of the Interior in 1916, and ask you to note the designation of Mare Island at this end, and the designation of the other area as Island No. 1, with an intervening space between the two islands, and ask you if you consider that a fracture or an indentation in the coast line between Carquinez Straits and Sonoma Creek?

A. This map plainly shows a dyke surrounding the area marked Island No. 1. It shows an area of marsh land between Mare Island and Island No. 1. The mean high water line is shown unbroken from Mare Island. It positively does not show a break in the coast line between Carquinez Point and Sonoma Creek. It shows an area of marsh land above mean high water between Mare Island and the Island designated on the map as No. 1. [222]

Mr. BURKE: Q. You said something about the reclamation of Island No. 1. I call your attention to these 1000 tidal inlets traversing Island No. 1 in every direction, and I ask whether that indicates to your mind that the land is reclaimed or unreclaimed?

A. The map plainly indicates dykes throughout this area. Putting in a dyke is one of the processes of reclamation. I did not mean to indicate in my testimony that one of these sloughs north of 34 was Napa Creek.

(Testimony of Alfred Modesto Sobieralski.)

Redirect Examination.

When I stated that I found no record of any water-way traversing Mare Island from San Pablo Bay to Mare Island Strait, I understood a water-way to be a body of water of a fixed course whose banks would be visible to a surveyor. I did not understand it to be a [223] passage way for ships, or navigable. The word "water-way" conveys to me a notion of permanence or a stream or water-way which had banks of enough permanence so that it would remain there for some time. It also conveyed the notion of continuity, but I did not understand it as having reference to navigability or passage way for ships or vessels. My reference to mean high water, as determined by taking the average of high tides over a period of nineteen (19) years would be the scientific, accurate mean high tide and that could only be obtained by observing the tide during the entire moon's orbit. It takes nineteen (19) years for what I would call a primary determination or for scientific tidal accuracy.

For the purpose of surveys, no such observation is practical for making a survey of a place like Mare Island, but special publications issued by the Coast Survey on tidal data specify that the plane of high water can be determined within one-tenth of a foot by a month of observation, which refers to a primary determination, and within a half a foot by day observation. All of the officers of the coast survey, in making tidal observations use the tides in their hydrographic surveys, and instructions in their

(Testimony of Alfred Modesto Sobieralski.)

topographic work specify that they should acquaint themselves with the stage of the tide at all times when they are working, from their data. A neap tide refers only to two tides which occur during the month and is the lowest of the high water during a month. A spring tide is the opposite of neap, the line of the highest tide during the month.

In plain use, the term "neap" would be considered lower than the mean high tide. Neap tide at Mare Island is roughly about a foot lower than the mean high water and the mean high water as shown on the map is one foot higher than the mean of the neap tide. From my knowledge of the maps which I have identified, I found the areas actually on the land very much as indicated on the maps. There was no difficulty in recognizing the various parts and points [224] of the island. I notice that many of the features that are recently plotted are indicated on the latest Coast and Geodetic Survey Charts and the general condition of the land is the same as what my mental picture of the land would be.

Witness Recalled on Direct Examination.

The document now shown to me is a copy of a geological survey quadrangle entitled: "California-Napa Quadrangle." The edition of May, 1902, reprinted March, 1913.

The label on the white area to the north end of Mare Island area, Island No. 1, is a map referred to in the notes as the source of the label Island No. 1 on the Coast and Geodetic Chart. The white

(Testimony of Alfred Modesto Sobieralski.)

area is continuous from the lower end of Mare Island, where the Navy Yard is located, across the narrow neck from Sonoma Creek. The heavy blue line at the outside of the white area on the San Pablo side is a representation of the mean high water line. The heavy blue line on the left-hand side, between Mare Island Straits and the land area represents the mean high water line. The representation of cross-hatching inside the blue line at the neck of the Isthmus would represent a dyke or some ridge. The blue cross-hatching represents marsh land. The brown cross-hatching surrounding the white area represents a dyke or some ridge of some elevation.

(The document was received in evidence as "Plaintiff's Exhibit L-31".)

Cross-Examination by Burke.

Soundings are made from a boat drawing very little water, not over a foot, so that in approaching Mare Island from the middle of Napa Creek, when the bow of the boat reached water that was not more than a foot deep, it would stop there. If it was impossible to push the boat across the overflowed portion of Mare Island, no soundings would be taken, altho it might be covered by water, so that the sounding area is not indicated when the sounding party has [225] reached a point which prevented it from proceeding further with the boat.

Referring to the description of Mare Island, as made by the Sloat Board of Surveyors in 1852, pur-

(Testimony of Alfred Modesto Sobieralski.)

suant to act of 1852, I would say that the large body of tule land that bounded Mare Island on the north, as shown on "Plaintiff's Exhibit L-23", Chart 5533, is approximately one-eighth of a mile from the Machine Shop. I believe that the reference to "the large body of tule extending to Mare Island from the Machine Shop", as described in the field notes of the Freeman Survey, made in 1877, is probably the same tule line that the Sloat Board referred to.

Referring to the map dated September 19, 1910, marked: "Defendants' Exhibit 2" for identification, the northern line of that map, marked "Shore Line 1852", extending from San Pablo Bay across the northern end of high land north of Mare Island appears in general with the same line as depicted upon all the other maps that I know of in contour and sinuosity.

Q. Now, assuming that that map was correct, would you say that that shore line abutted land or abutted water?

A. Abutted water.

Assuming this map to be correct, there was a shore line that extended from San Pablo Bay to Napa Creek that did interrupt the continuity of the coast line between Carquinez Point and Sonoma Creek.

The COURT: What is No. 2 for identification?

Mr. BURKE: The McKay Survey of September 19, 1910.

Q. I show you Defendants' Exhibit for identification 3, which is endorsed "C 242, File 5402, U. S.

(Testimony of Alfred Modesto Sobieralski.)

Navy Yard, Mare Island, Cal., Area North of Yard to be Filled by Dredger, Submitted," and ask you, taking the line extending from Machine Shop on Napa Creek, and extending to San Pablo Bay, how is it marked?

A. "Line of high land." [226]

Q. I show you Defendants' Exhibit 4 for identification, Map of Mare Island between Steam Engineering Buildings and Swamp and Overflowed Land Survey No. 569, etc., C 188, and I ask you if that indicates the shore line extending from Napa Creek to San Pablo Bay, and if it is so marked?

A. There is a dotted line here which goes over some places of considerable elevation, and is marked "1863 Shore Line".

Q. 1863 Shore Line?

A. Yes.

Q. I show you Defendants' Exhibit No. 5 for identification, Official Map of the State of California by an Act of the Legislature passed March 25, 1853, Complied by W. H. Eddy, 1854, and ask you if that indicates an island marked "Mare Island."

A. Yes.

Q. Does it indicate a water course to the northern part extending from Mare Island Straits to San Pablo Bay?

A. There is a line there which could be interpreted as a water way.

Q. It could be interpreted?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. But you would not interpret it so?

A. It might be some other line.

Q. But the chances are you think that it indicates a water course?

A. Yes. I might say in connection with that that there might be something on the original which would throw some further light on the subject.

Q. It is a certified copy, you observe?

A. It is a photographic copy, but there might be colors or some other things.

Q. And there might not, also?

A. I will admit that.

Q. I will show you Defendants' Exhibit 6 for identification, a map of the United States Navy Yard, Mare Island, showing conditions on June 30, 1925, that is only a few years ago, and ask you if there is indicated thereon the high water line extending from Napa Creek to San Pablo Bay?

A. I find a line which extends part way across San Pablo Bay——

Q. Where does it stop, take your pencil and mark it? [227]

A. It stops here, and there is another line out here.

Q. Put a mark on it and mark it with an "X". How is it marked?

A. It says "Original high water line," here, but there is another line here which says "Mean High Water Line."

Q. Is that a continuation of it?

A. No, they are just joined.

(Testimony of Alfred Modesto Sobieralski.)

Q. I show you Defendants' Exhibit 7 for identification, entitled "Map of portion of Mare Island showing location of old shore line west of the Steam Engineering Building, February, 1906," and which reads, "The line of upland and tule in 1863 is shown by a heavy double-dotted-and-dashed line," would that map indicate anything to you as an expert as to the shore line?

A. This does not say where they got the information as to the line of upland.

Q. These maps come from the Commandant's Office, engineers of the Navy who have been in possession of this land for 52 years, on the ground, and making maps of it; that ought to be pretty good authority, shouldn't it? Don't you think it would be as good authority as a man at a desk in Washington depicting areas of land from old maps? I leave it to you.

A. They have to get that line from some other map, and they are given those maps.

Q. I did not ask you that? Does that map indicate——

Mr. PECKHAM: I must protest against this interrupting of the witness every time he starts to answer.

Mr. BURKE: His answer was not responsive, I am asking him if that indicates anything to his mind about the shore line as indicated thereon, not what other maps show, or whether this be right or wrong.

(Testimony of Alfred Modesto Sobieralski.)

A. The land that you ask about is the line of upland and tule in 1863, which runs across high land.

Q. From where?

A. It runs across high land.

Q. From where?

A. From a point near the Machine Shop, and ends——

Q. (Interrupting) It ends at San Pablo Bay, does it not?

A. No, it does not run to San Pablo Bay. [228]

Q. Now, I show you Defendants' Exhibit 8 for identification, which reads "Portion of Mare Island, Cal., prepared to accompany papers relating to claim of E. H. Sawyer to 164.55 acres of swamp and overflowed land. Black lines are from Government survey made in 1900. Machine Shop located from survey made by James E. Freeman, Deputy Surveyor, July, 1877, under instructions from the U. S. Surveyor General. Green lines show area surveyed by H. Patton, Surveyor, in June, 1855, of land issued to David N. Darlington by the State of California, March 18, 1857, and is plotted from Patton's notes. Red lines show the same area as green lines, but it is plotted to agree with the survey of the land immediately adjoining on the north, made by William W. Fitch, County Surveyor of Solano County, September 28, 1869, and with the topography as described in Patton's Notes."

Of course, we will furnish all of this later. I ask you if that map indicates anything to you as to the northern boundary of Mare Island?

(Testimony of Alfred Modesto Sobieralski.)

A. There is a line, here, which runs from the Machine Shop part way over to San Pablo Bay, and it says on one side "Edge of upland", and on the other side of the line it says "Scrap piles."

Q. For the purpose of showing the area of Mare Island independent of any proof that has been adduced upon the subject, I call your attention to Defendants' Exhibit 9 for identification, a map of Mare Island Navy Yard, Calif., original purchase and present area, and ask you to look at that map and state what the area of Mare Island is stated thereon to be?

A. It says "Total area south of line A-B"——

Q. Where is that?

A. 897 acres.

Q. Where is A-B?

A. A-B is the line which I will indicate.

Q. This line from the Machine Shop, running across the island?

A. This point.

Q. This indicates that the entire area of Mare Island from that point, the line across to Carquinez Straits, is what?

A. It says the area south of this line is 897 acres. [229]

Q. I call your attention, Mr. Witness, to Defendants' Exhibit 10 for identification, and ask you if it bears the legend, "Map of Mare Island and adjacent marsh lands."

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. Is that right?

A. Yes.

Q. Does that indicate anything to your technical mind whether the marsh land was a part of Mare Island, or whether it was adjacent and contiguous?

A. I would say that it indicates they are contiguous, but the title does not attempt to delimit the limits of Mare Island.

Q. Are you speaking now as a lawyer, or an expert on maps?

A. I am interpreting that title.

Q. What does "adjacent marsh lands" mean?

A. I would say part of Mare Island.

Q. I am talking about that caption there.

A. Mare Island and adjacent marsh land.

Q. I have called your attention heretofore to the description in the Castro conveyance, and we will turn now to the Act of May 11, 1854, and I will ask you if you are familiar with the description of the land conveyed by that back to the United States?

A. No, I am not.

Q. Well, I will read it to you: "The title and interest of the State of California to and in said portions of the island described in the preceding section as are overflowed beach or swamp lands, on the eastern shore of the said island." Where would that be, on the eastern shore of said island?

A. On the eastern shore would be somewhere along there.

Q. Somewhere along here. Can't you tell where the eastern shore of Mare Island is from that map?

(Testimony of Alfred Modesto Sobieralski.)

A. We have just described the northern shore.

Q. It has not got any eastern shore, has it?

A. This is the east side of the island.

Q. "From the southern point thereof to a parallel intersecting the [230] northern point of the high lands and extending into the waters of the bay or straits, washing the eastern shore of said high lands of the island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section." Where, in your judgment, would that parallel intersecting the northern point of the high lands pass?

A. I would interpret it as the point where the Machine Shop was built, in that area, there.

Q. While I think about it, I will ask you to say what the chart 5533 indicates as the ordinary high tide of Mare Island. You will find the table down in the corner.

A. It has a rather elaborate notation regarding the tide. The mean line of high water gives the time of high water; it does not state what the ordinary high water is.

Q. What is that legend about 7 feet and some inches of water?

A. Mean height of higher high water plane above plane of reference at Mare Island 6.9 feet. The one just about refers to the time, 7 hours and 9 minutes —mean high of all high water above plane of reference at Mare Island is given as 6 feet. That is the highest figure. At other points it gives it as 5.6 feet, 5.8 feet.

(Testimony of Alfred Modesto Sobieralski.)

Q. I call your attention to the Freeman Survey. You have seen it, I take it, since you have been here?

A. I am not very familiar with it.

Q. I show you the Freeman map of 1877, and ask you if that map indicates the location of Station 54?

A. Yes.

Q. Can you approximately locate Station 54 upon chart 5533?

A. Yes.

Q. Where would you say it was?

A. It appears to be about due west of the Machine Shop, somewhere in here.

Q. Where would you say Station 138 was, on the Napa River side, and taking the Machine Shop?

A. I do not see any point——

Q. Where would you judge by the distance between the other stations 138 is or was?

A. It looks like it is at the corner of the Machine [231] shop.

Q. Now, assuming that Surveyor General Wagner, in rejecting the Freeman Survey as including an island not a part of Mare Island, said the line of Mare Island would be that drawn from Station 54 on the San Pablo side to Station 138 on the Napa Creek side, what would you say about that—I withdraw that question. What would that opinion, or decision, or statement of United States Surveyor General Wagner on the ground at the time carry

(Testimony of Alfred Modesto Sobieralski.)

to your technical mind as to the northern boundary of Mare Island?

A. I think it very clear that he is talking about a line from Station 54 to 138.

Q. Would that carry to your mind that Surveyor General Wagner had depicted on the Freemont Map the northern boundary of Mare Island?

A. That is a hard one.

Q. That is a hard one to answer, as you have found?

A. He depicted that northern boundary as a property line, but that would not have any influence on the geographical situation.

Q. Is that an opinion of a lawyer or an expert for the Coast Survey?

A. That is giving it as an expert for the Coast Survey. If we had an island marked on a chart and a granting act or deed granting part of the land, or giving it a different name, we would not consider that two islands.

Q. Let us see about that, Mr. Witness. Did you know that the Freeman Survey was made pursuant to the Act of July 1, 1864, which provided for a survey of confined Mexican grants?

A. No, I did not know that.

Q. Did you know that the statute required a publication of that survey after it was returned to the Surveyor General's office?

A. No.

Q. Did you know that it was the duty and jurisdiction of the Surveyor General to decide whether

(Testimony of Alfred Modesto Sobieralski.)

or not a map or survey was correct—that was a statutory duty, did you understand that?

A. I understand that in a general way, yes.

Q. Wouldn't you distinguish between a decision by a statutory of- [232] ficer—wouldn't you give it more weight than you would the act or deed of some draftsman?

A. If I were deciding property lines and geographical features, our Coast Survey would be given much more weight.

Q. Than the decision of any officer?

A. Yes.

Q. How about a court?

A. A court would not make a decision on a geographical feature or a property line.

Q. A court would not make a decision upon a boundary. What is it going to do here, then? Well, I will withdraw that. Assume that subsequent to 1850, pursuant to an Act of Congress donating 500,000 acres of land to California for school purposes, California sold 160 acres of land, and in the map of the same made by the County Surveyor he depicted the northern boundary of Mare Island to be the southern boundary of what is now 34, would that carry to your mind any indication of the northern boundary of Mare Island?

A. As far as property line, it must depict some line, but as far as the geographical feature, it would not have any influence on my decision.

Q. You think that a survey made is a property line, not a statutory line?

(Testimony of Alfred Modesto Sobieralski.)

A. I consider a property line as a statutory line, but as far as interpreting the mean high water line, our own survey would be the criterion which we would follow:

Q. In other words, you will follow your own surveys?

A. Yes.

Q. Is it your understanding that every fact depicted upon that Coast Survey chart 5533 is absolutely correct?

A. No, it is correct to the best of our knowledge.

Q. Now, let us assume that the Court of Appeals of this Circuit has decided that the Court must take judicial cognizance of that chart and find that everything in it is absolutely true and correct, what would you say then?

A. I know the decision you are referring to, but I think if you would read the decision carefully you would see that it does not make such a broad statement. [233]

Q. I have been reading that decision for ten or twelve years, now. I think you are in the wrong department. You ought to go in the Attorney General's Office. Here is a photostatic copy of the letter of Surveyor General Wagner to the Secretary of the Interior, rejecting the Freemont Survey, and pointing out where the true line is.

The COURT: Are you offering that?

Mr. BURKE: I will have it marked Defendants' Exhibit 11 for identification. I read you from

(Testimony of Alfred Modesto Sobieralski.)

the last paragraph of the letter: "I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138." You have that in mind now?

A. Yes.

Q. You do not care to change your testimony about that?

A. No.

Q. What is your definition of an island?

A. A body of land surrounded by water.

Q. Navigable water?

A. Not necessarily, no.

Q. In other words, an island is a body of land entirely surrounded by water, regardless of its depth?

A. Yes.

Q. What is your definition of tule? I will read you this definition: "Tule, either of two large bulrushes growing abundantly in overflowed land in the southwestern United States, especialy in California, at the junction of the Sacramento and San Joaquin Rivers, where larger tracts are known as tule lands." The Strait of Carquinez is generally in that locality, as you understand it?

A. Yes.

Q. Do you agree with the definition that tules grow on overflowed land?

(Testimony of Alfred Modesto Sobieralski.)

A. My understanding is that tules will not grow on land which is not overflowed at some time or other.

Q. Now, I want to ask you a question, and I am not smart-alecking about it, or trying to be facetious, at all, but I want to illus- [234] trate this question, that where tules and bulrushes grow—are you familiar with the Old Testament?

A. Yes.

Q. Did you ever read that one morning Pharoah's daughter went down to the bulrushes and found Moses floating in the vicinity of the bulrushes?

A. Yes.

Q. That would indicate to you that bulrushes and tule grow on overflowed lands?

A. Yes.

Q. Of a sufficient depth to float upon the surface a ten or twelve pound baby boy in a basket.

A. Yes.

Q. Can you estimate generally the width between the southerly boundary of Island No. 1 as depicted upon Chart 5533 and the northerly boundary of Mare Island, depicted thereupon?

A. The limits of both of them are so indefinite on these charts that they practically are contiguous.

Q. Practically contiguous?

A. Yes.

Q. What is your definition of "contiguous"? Separated?

A. No, joining.